Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

FULTON COUNTY, GEORGIA,

Petitioner,

v.

DANIEL WEBSTER, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

OVERTIS HICKS BRANTLEY
JUNE GREEN
OFFICE OF THE FULTON COUNTY ATTORNEY
141 Pryor Street, S.W., Suite 4308
Atlanta, Georgia 30303
(404) 730-7750

PENN PAYNE
Counsel Of Record
DOROTHY YATES KIRKLEY
KIRKLEY & PAYNE, LLP
999 Peachtree Street, Suite 1640
Atlanta, Georgia 30309
(404) 892-8781

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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103 pp

QUESTIONS PRESENTED

I. Whether the Eleventh Circuit's holding, that respondent, as a "disappointed bidder," stated a claim for retaliation under 42 U.S.C. §1981, is in conflict with the limited nature of this Court's decision in *Board of Comm'rs v. Umbehr.*

II. Whether the District Court's supplemental jury instruction defining discriminatory intent, given at the request of the jury during deliberations, was a misstatement of this Court's decision in *Personnel Adm'r v. Feeney* and virtually compelled the jury to make a finding of petitioner's discriminatory intent.

III. Whether, if a fact-finder in a disparate treatment case finds that a government defendant acted with discriminatory intent but also finds that it acted in good faith, it is impermissible as a matter of law to impose liability on the governmental entity, as suggested by the concurrence in this Court's decision in *Wygant v. Jackson Bd. of Educ.*.

IV. Whether, in conflict with this Court's decision in *Brotherhood of Teamsters v. United States*, the District Court's errors led the jury to use a presumption that the respondent was a victim of a pattern or practice of unlawful racial discrimination, instead of requiring proof of the petitioner's actual discriminatory intent.

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit whose judgment is sought to be reviewed:

Fulton County, Georgia,
Appellee/Cross-Appellant Below.

Daniel Webster,
Appellant/Cross-Appellee Below.

Peggy Webster,
Appellant/Cross-Appellee Below.

Webster Greenthumb Co.,
Appellant/Cross-Appellee Below.

Kelly Goff,
Appellant/Cross-Appellee Below.

Pursuant to Rule 29.6, petitioner states that the named petitioner does not have any corporate parent, subsidiary, or affiliate that is publicly held.

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PETITION FOR A WRIT OF CERTIORARI

Fulton County, Georgia ("Fulton County" or "the County"), through undersigned counsel, respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit reversing the decision of the United States District Court for the Northern District of Georgia dismissing Webster Greenthumb's ("WGT") retaliation claims on summary judgment and affirming the decision of the District Court with respect to questions II, III and IV of this petition, which pertain to the requirement of discriminatory intent in a 42 U.S.C. §1981 claim.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 283 F.3d 1254 and is reprinted at Pet. App. 1-6. The opinion of the District Court dismissing WGT's retaliation claim on summary judgment is reported at 51 F. Supp. 2d 1354, and is reprinted at Pet. App. 7-55. Orders of the District Court dated November 19, 1999, and February 8, 2000 allowing the admission of evidence concerning the unconstitutionality of the County's Minority and Female Business Enterprise ("MFBE") Program are unreported, but are reprinted at Pet. App. 56-58 and 59-60, respectively.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 28, 2002. *See* Pet. App. 1-6. A timely petition for rehearing was denied on June 24, 2002. Pet. App. 61-62.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1981

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be

subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case frames the serious dilemma that governmental entities confront in their public contracting functions, when they are faced with a credible complaint of race discrimination by one vendor, when they attempt to remedy that complaint, and when the remedy then triggers a race discrimination complaint from another vendor of a different race. This petition seeks review of the Eleventh Circuit decision affirming the District Court's rulings and orders on the critical question of discriminatory intent under this recurring fact pattern, where the nature and definition of the governmental entity's intent was central to the outcome of the jury trial and where the District Court's rulings were contrary to Supreme Court decisions. This petition also seeks review of the Eleventh Circuit's decision reversing the District Court's grant of summary judgment dismissing the plaintiff's retaliation claim made

under 42 U.S.C. §1981, in which the Eleventh Circuit failed to apply the relevant Supreme Court decision.

In this "reverse" race discrimination case, a white-owned vendor of tree removal services, Webster Greenthumb Co. ("WGT"), claimed that Fulton County, Georgia and Michael Cooper ("Cooper"), its Director of Contract Compliance and Equal Employment Opportunity, discriminated against it on the basis of the race of its owners in violation of 42 U.S.C. §1981 and the Equal Protection Clause, as enforced by 42 U.S.C. §1983, and then retaliated against it after it filed a lawsuit. The discrimination claim stems from Cooper's actions to remedy a credible complaint of race discrimination brought by an African-American-owned business, Ben Edwards Landscaping ("BEL"), which competed against WGT to provide tree removal services to the County's Public Works Department. WGT claimed that Cooper's actions to obtain a fair amount of work for BEL amounted to unlawful discrimination against WGT.

At the trial the jury interrupted its deliberations to ask the District Court for a supplemental jury instruction to define the critical element of Fulton County's and Cooper's "intent" as used in the phrase "intentionally discriminate" in the verdict form. Pet. App. 63-65. The District Court gave an erroneous instruction that conflicted directly with the definition of discriminatory intent in *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979). The Eleventh Circuit, ignoring *Feeney*, did not correct the error. Its failure to do so warrants review, since discriminatory intent is the crux of any disparate treatment case, whether under the Equal Protection Clause, §1981, §1983 or Title VII, and an erroneous definition of it affects many more cases than just this one.

Despite the erroneous definition of intent, the jury nevertheless found that, even though Cooper had intentionally discriminated against WGT, he had done so in a good faith effort to respond to a nonfrivolous complaint by another contractor of discriminatory treatment. The County moved under Fed.R.Civ.P. 50 for judgment as a matter of law; the District Court denied the motion; the Eleventh Circuit affirmed without discussion. Fulton County seeks review on the ground that a finding of good faith in taking corrective measures to remedy one claim of discrimination is fundamentally at odds with a finding of discriminatory intent in a countervailing claim, such that liability should not be imposed on the County. This is an important federal question which this Court has not settled but which Justice O'Connor recognized as a quandary for governmental entities in her concurrence in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). This case presents the opportunity to resolve the quandary.

The Eleventh Circuit also failed to correct the District Court's errors in admitting evidence and giving repeated instructions to the jury that the County's affirmative action plan was unconstitutional and illegal. These errors led the jury to presume, without proof of the County's discriminatory intent against this particular plaintiff under the particular circumstances of Cooper's attempts to remedy BEL's race discrimination complaint, that WGT was a victim of a pattern or practice of racial discrimination. Such a presumption is in direct conflict with *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), and its progeny, and the Eleventh Circuit's decision warrants review for that reason.

Prior to trial, the District Court relied on this Court's decision in *Board of Comm'rs v. Umbehr*, 518 U.S. 668 (1996) to dismiss WGT's claim of retaliation under 42 U.S.C. §1981. *Umbehr* distinguished the retaliation claims of "disappointed bidders" for new government contracts, which is the status that applied to WGT, from the retaliation claims of an employee or a vendor with a pre-existing commercial relationship, and the District Court correctly followed that distinction in applying *Umbehr*. The Eleventh Circuit reversed, however, and its decision warrants review because it is in conflict with the limited nature of *Umbehr,* because it provides the Court with the opportunity to resolve the question left open in *Umbehr*, and because, if uncorrected, it will expose government entities to additional potential liability to disappointed bidders who had no on-going connection with the government and no expectation of continuing to do business with the government.

A. Background

This case arises out of a good faith effort by Fulton County, Georgia and its Director of Contract Compliance and Equal Employment Opportunity to address and remedy a credible complaint of race discrimination in the assignment of work, brought by a vendor, Ben Edwards Landscaping, whose owner was African-American. That vendor was not the complaining party in this case, however; the plaintiff in this case was Webster Greenthumb, which was owned during the relevant time period by a white female, Peggy Webster. WGT and BEL were the two vendors for tree removal services for Fulton County's Department of Public Works in 1995 and 1996.

WGT's discrimination claim was based on two actions: the assignment of a work order to BEL in 1995 and the equalization of the amount of the two companies' purchase orders in 1996. Prior to each of these incidents challenged by WGT as discriminatory, Ben Edwards complained to defendant Cooper that *he* was the victim of racial discrimination by the Public Works Department. Tr. Transcript[1] 839-840. Cooper, who was charged with the responsibility of insuring equal opportunity in Fulton County's contracting and employment, made certain interdepartmental communications in 1995 and 1996 designed to ensure that "Ben's Landscaping will be treated fairly." WGT's Exhibit 393. Following Cooper's intervention, the County's Public Works and Purchasing Departments took the challenged actions in an attempt to remedy BEL's allegations of discrimination. WGT's Exhibits 204, 436, 437, 446, and 448. In response, WGT alleged that these actions were anti-white and racially discriminatory to its detriment, and WGT initiated this lawsuit.

B. Proceedings Below

WGT filed this suit in 1996 against Fulton County and Michael Cooper claiming, *inter alia*, that it was a victim of "reverse" race discrimination in Fulton County's public contracting. In 1998, WGT amended the Complaint to add a claim that the County's Minority and Female Business Enterprise ("MFBE") Program was unconstitutional, seeking injunctive relief on that claim. WGT also

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[1] The trial on WGT's claim for individual discrimination was held on February 14-18, 22-24, 2000. References to the trial transcript are designated "Tr. Transcript" followed by the relevant page numbers.

added a retaliation claim alleging that the County refused to award bids to it after it filed a lawsuit against the County. The District Court dismissed the retaliation claim on summary judgment. Pet. App. 48-49. In 1999, the District Court held a bench trial on the constitutional challenge to the "numerical participation goals" of the MFBE plan. Because the Court found that the goals were racial preferences unsupported by the County's evidence using a strict scrutiny standard of review, it enjoined the use of "participation goals."[2] *See, Webster v. Fulton County*, 51 F. Supp. 2d 1354, 1383 (N.D. Ga. 1999), *aff'd*, 218 F.3d 1267 (11th Cir.), *r'hrg and r'hrg en banc denied*, 235 F.3d 1347 (2000), *cert. denied*, 532 U.S. 942 (2001).

At the subsequent trial on WGT's claim for individual discrimination, the jury awarded WGT lost profits of $8,750 against the County and only $1 in nominal damages (but no punitive damages) against Cooper. Following the verdict the County moved under Fed.R.Civ.P. 50 for judgment as a matter of law, in part on the ground of inconsistent special verdict responses. The District Court granted qualified immunity to Cooper and dismissed him from the suit based upon the jury's answers to the special verdict questions, Pet. App. 63-65, but denied the rest of the motion as to the County. Tr. Transcript 1195-1196.

WGT appealed, *inter alia*, the District Court's dismissal of its retaliation claim. Fulton County filed a cross

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[2] Other portions of the MFBE which were not challenged by WGT are therefore presumptively constitutional, including the provisions relating to a) the policy of Fulton County Government to promote full and equal access in contracting and procurement opportunities for all business in Fulton County; and b) the duty of the Contract Compliance Office to investigate complaints of unfair treatment. WGT Exhibit 1, pp. 1, 24.

appeal of, *inter alia*, questions II, III and IV discussed in this petition. On February 28, 2002, a panel of the Eleventh Circuit reversed the dismissal of WGT's retaliation claim and remanded the case for trial on that claim. The panel decision affirmed without discussion the District Court's rulings on all of the County's issues. Pet. App. 3.

REASONS FOR GRANTING THE WRIT

This case presents four important questions, three of which relate to the crucial issue of discriminatory intent in the civil rights context and the fourth of which relates to the issue of retaliation, an all too frequent companion claim in civil rights cases.

The three intent issues all arose in connection with the County's efforts to remedy BEL's credible complaint of race discrimination. The questions are: 1) whether the District Court's supplemental jury instruction defining discriminatory intent, given at the request of the jury during deliberations, was a misstatement of this Court's decision in *Personnel Adm'r v. Feeney* and virtually compelled the jury to make a finding of Fulton County's discriminatory intent; 2) whether, if a fact-finder in a disparate treatment case finds that a government defendant acted with discriminatory intent but also finds that it acted in good faith, it is impermissible as a matter of law to impose liability on the governmental entity, as suggested by the concurrence in this Court's decision in *Wygant v. Jackson Bd. of Educ.*; and 3) whether, in conflict with this Court's decision in *International Brotherhood of Teamsters v. United States*, the District Court's errors led the jury to use a presumption that the respondent was a

victim of a pattern or practice of racial discrimination, instead of requiring proof of the County's actual discriminatory intent.

Each of these questions warrants review, *see* S. Ct. Rule 10, as discussed in more detail under each heading below. The overarching reason for review, however, applicable to all three questions, is that they implicate a recurring fact pattern and a recurring dilemma for the practical functioning of government entities and officials. Government entities are bound not to discriminate in public contracting, as well as in employment, and to take corrective measures when confronted with claims that they have discriminated. U.S. Const. amend. XIV, 42 U.S.C. §1981, 42 U.S.C. §1983, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e. *See*, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764 (1998). As a result, government entities often then face countervailing claims of discrimination from parties of another race, gender, or ethnicity, who claim that the remedial steps taken to address the original complaint have crossed the line and become new discrimination. If this Court defines, refines and outlines the contours of the necessary discriminatory intent that a governmental entity must have in order to be held liable for this alleged "new" discrimination, such an opinion will give a clear path to governmental entities to guide their conduct.

The other question presented also warrants review: whether the Eleventh Circuit's holding, that WGT, as a "disappointed bidder," stated a claim for retaliation under 42 U.S.C. §1981, is in conflict with the limited nature of this Court's decision in *Board of Comm'rs v. Umbehr.* Resolution of the extent of permissible retaliation claims brought by disappointed bidders for new government

contracts will help to guide governments in their public contracting. If there is no safe harbor giving governments leeway to make decisions about new contracts without fear of this type of litigation, then they will be exposed to suits from every category of disappointed bidder. Fulton County asks the Court to give meaning to *Umbehr*'s limitation and to provide at least minimal protection from the lawsuits of disappointed bidders.

I. THE ELEVENTH CIRCUIT'S HOLDING THAT WGT, AS A "DISAPPOINTED BIDDER," STATED A CLAIM FOR RETALIATION UNDER 42 U.S.C. §1981 IS IN CONFLICT WITH THE LIMITED NATURE OF THIS COURT'S DECISION IN *BOARD OF COMM'RS V. UMBEHR.*

The Eleventh Circuit's reinstatement of WGT's retaliation claim merits review because the panel failed to apply this Court's decision in *Board of Comm'rs v. Umbehr*, 518 U.S. at 685, thereby eroding the limitation on retaliation claims of "disappointed bidders" which the Court articulated in *Umbehr* but did not decide. This Court has previously granted certiorari where the Court of Appeals had based a decision on a point of law expressly left undecided in prior Supreme Court opinions, and review is similarly warranted here. *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 161-162 (1999); *Dolan v. City of Tigard*, 512 U.S. 374, 377 (1994).

In *Umbehr*, the Court held that an independent contractor who has a preexisting, ongoing contractual relationship with a governmental body may sue under §1983 if the government entity retaliates against him for exercising his First Amendment rights and terminates

that contractual relationship. The Court cautioned, however, that the decision was "limited." "Because Umbehr's suit concerns the termination of a pre-existing commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship." *Umbehr*, 518 U.S. at 685. This limitation on the scope of the *Umbehr* decision – whether "disappointed bidders" for *new* government contracts who do not have a pre-existing commercial relationship may bring an action based upon a local government's retaliatory failure to award a contract – was therefore unresolved. WGT's retaliation claim now presents the issue that was previously left open.

In the instant case, WGT alleged facts indicating that it was a disappointed bidder for new government purchase orders and claimed retaliation as a result of its filing of a race discrimination lawsuit against Fulton County.[3] The District Court applied *Umbehr* and, by dismissing WGT's

[3] The facts alleged by WGT on summary judgment or made in its proffer at trial lead to the conclusion that WGT was, at best, a disappointed bidder or applicant for a new government contract. WGT alleged at the summary judgment stage that after the filing of this suit in September, 1996: 1) WGT did not receive post card notifications of upcoming bid opportunities; 2) Mr. Webster did not receive a requested 1997 bid package; and 3) a WGT 1998 bid proposal was not accepted. *See*, Response by Plaintiffs to Motions for Summary Judgment. WGT's retaliation allegations all involved new bids, not a pre-existing contractual relationship. Moreover, WGT's 1996 purchase order could not have been rolled over or renewed for 1997. Tree removal services were put out for a new bid for 1997. WGT had no expectation that its bid would be accepted. It did not have an ongoing relationship with Fulton County with regard to these services. It did not have an automatic renewal of its previous purchase order.

retaliation claim, heeded this Court's warning that it was a limited decision.

The Eleventh Circuit reversed the District Court, distinguishing *Umbehr* and applying *Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405 (11th Cir. 1998).[4] The Court of Appeals held that *Umbehr* was not applicable because the retaliation there was based on the disappointed bidder's exercise of his First Amendment rights, whereas the retaliation alleged in the present case was based on WGT's filing a lawsuit against Fulton County under §1981 charging race discrimination. This is a distinction without a difference, however, because both situations involve a governmental entity allegedly punishing a bidder or applicant for engaging in some sort of protected activity. There is simply no logic in denying disappointed bidders the opportunity to enforce a constitutional right under the First Amendment, while granting them the opportunity to enforce a statutory right under §1981, and the Eleventh Circuit should have applied *Umbehr*.

Moreover, the Eleventh Circuit very recently decided another case in which it further eroded the limitation articulated in *Umbehr*. *Mangieri v. DCH Healthcare*

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[4] The Eleventh Circuit's reliance upon its holding in *Andrews* is misplaced. *Andrews* holds that, in the wake of Congress' 1991 Amendments to §1981, retaliation claims brought pursuant to that statute are newly cognizable. *Andrews*, 140 F.3d at 1412. This principle is not controverted and was not the point at issue in the District Court's dismissal of the claim. The retaliation claim discussed in *Andrews* relates to the termination of an employee, not the failure to award a bid to an independent contractor. *Andrews* is simply not on point in light of *Umbehr*.

Authority, ___ F.3d ___, 2002 WL 2012896 (11th Cir. Sept. 4, 2002). The Eleventh Circuit applied *Umbehr* but characterized the prior relationship that the plaintiff had with the governmental entity, and defined a "termination" of that relationship, in such a way as to swallow up the distinction between a pre-existing commercial relationship and a new contract. Under *Mangieri* it is difficult to imagine a category of disappointed bidders who could not bring retaliation claims, except bidders who had never done any type of business whatsoever with the government body.

In reaching its decision both in the present case and in *Mangieri,* the Eleventh Circuit chose not to follow the reasoning of the Third Circuit in *McClintock v. Eichelberger*, 169 F.3d 812 (3d Cir.), *cert. denied*, 528 U.S. 876 (1999). *McClintock* addressed the viability of a claim brought by independent contractors who had had several distinct prior contractual relationships with a regional planning and development commission, including a three-year vendor-vendee relationship immediately preceding the events at issue in the case. The executive board of the commission refused to award a new contract to the vendors because they had backed disfavored political candidates. The Third Circuit characterized *Umbehr* as involving the termination of "an active ongoing independent contractor relationship," not "bidders or applicants for new government contracts." *Id.* at 816. The *McClintock* appellants, by contrast, were bidders or applicants for new government contacts, despite their history of prior contractual relationships with the commission, and such disappointed bidders did not have a sufficiently ongoing

relationship to support a claim for retaliation. *Id.* at 816-17. The court therefore refused to allow the claim to go forward.

The Eleventh Circuit's decision in this case, as well as in *Mangieri*, and its rejection of the Third Circuit's rationale in *McClintock*, establishes a trend whose ultimate effect is to erode the *Umbehr* limitation on a disappointed bidder's retaliation claims almost out of existence. Governmental entities are thus more at risk for additional liability or threatened liability from disappointed bidders who may have had no on-going connection with the government and no expectation of continuing to do business with the government. Fulton County therefore asks this Court to review the Eleventh Circuit's decision in order to give meaning to the limitation expressed in *Umbehr* and to preserve some minimal level of protection against lawsuits from the numerous contractors who unsuccessfully seek to do business with government entities.

II. THE DISTRICT COURT'S SUPPLEMENTAL JURY INSTRUCTION DEFINING DISCRIMINATORY INTENT, GIVEN AT THE REQUEST OF THE JURY DURING DELIBERATIONS, WAS A MISSTATEMENT OF THE LAW AND VIRTUALLY COMPELLED THE JURY TO MAKE A FINDING OF THE COUNTY'S DISCRIMINATORY INTENT.

The issue squarely presented to the jury was whether Fulton County's remedial efforts to address BEL's complaints of race discrimination in the assignment of a specific job in 1995 and in the amount of his purchase order in 1996 constituted illegal race discrimination against WGT. A finding of illegal discrimination, or not,

turned on the meaning of discriminatory intent, which this Court has defined clearly in *Personnel Adm'r v. Feeney*, 442 U.S. at 279.[5] "'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (Internal citation omitted.) The District Court, however, gave an instruction defining discriminatory intent that was in fundamental conflict with *Feeney*.

This Court has granted certiorari where a lower court has misapplied applicable Supreme Court precedent. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Mattz v. Arnett*,

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[5] The *Feeney* analysis was under the Equal Protection Clause as enforced under §1983. This case seeks to enforce the same Clause pursuant to §1981. This distinction is, however, immaterial in the context of the intent requirement. As this Court stated in *General Bldg. Contractors Assn., Inc. v. Pennsylvania*, 458 U.S. 375 (1982), §1981, a "legislative cousin[s] of the Fourteenth Amendment," "was enacted as a means of enforcing the recently ratified Fourteenth Amendment. In light of the close connection between [the 1870 legislation which evolved into §1981] and the Amendment, it would be incongruous to construe the principal object of . . . §1981, in a manner markedly different from that of the Amendment itself. . . . We conclude, therefore, that §1981, like the Equal Protection Clause, can be violated only by purposeful discrimination." *Id.* at 389-91. Accordingly, the standard of intent is the same regardless of the statutory enforcement mechanism. *See, e.g., Mescall v. Burrus*, 603 F.2d 1266, 1271 (7th Cir. 1979) ("The relationships of §§1981 and 1983 to the Fourteenth Amendment are so close and they are each so strongly under its influence that we believe the use of each section must be guided by the principles announced by the Supreme Court for application of the Fourteenth Amendment to discrimination cases," and citing *Feeney*.).

412 U.S. 481, 485 (1973). Review is therefore warranted here. Moreover, discriminatory intent is the crucial element in any disparate treatment case, whether under the Equal Protection Clause, §1981, §1983 or Title VII, and an erroneous definition of it, conflicting with Supreme Court precedent, affects many more cases than just this one.

There can be no doubt that "the elusive factual question of intentional discrimination" is the "ultimate" question in and the "crux" of disparate treatment claims. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 153 (2000); *Lowe v. City of Monrovia*, 775 F.2d 998, 1009 (9th Cir. 1985), *modified*, 784 F.2d 1407 (9th Cir. 1986) (quoting, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981)). The jury recognized the importance of the intent element, even to the extent of interrupting its deliberations to request a supplemental instruction on its meaning.[6] Tr. Transcript 1166. In response to the jury's request, the District Court gave the following instruction, over objection by Fulton County:

> Intentional discrimination in this context means that the defendant, or defendants, made decisions on the basis of race. A decision is made on the basis of race when the decisionmaker selected a particular course of action at least in

[6] The District Court had instructed the jury to answer two special interrogatories: "[D]id the defendant Fulton County intentionally discriminate against the Plaintiff on the grounds of race?" "[D]id the defendant Michael Cooper intentionally discriminate against the plaintiff on the grounds of race?" Pet. App. 63. The jury's request for a supplemental instruction was in reference to the language used in these two interrogatories.

> part because of, not merely in spite of, *race*. A defendant who acts with no racial animosity but who makes decisions on the basis of race can be held liable for intentional discrimination. In other words, ill will, enmity, or hostility are not prerequisites of intentional discrimination. Liability for intentional discrimination requires only that decisions be premised on race, not that decisions be motivated by invidious hostility or animus. I caution you that my response to your question should not be interpreted to imply that I believe that the defendants did or did not intentionally discriminate against the plaintiff on the basis of race. That is a question of fact which you must decide.

(Emphasis added.) (Tr. Transcript 1178-1179.)

This instruction conflicts with the decision of this Court in *Feeney* in two critical respects. First, "intentional" decisions are not those made "at least in part because of, not merely in spite of, *race*." As held in *Feeney*, an intentional decision, for purposes of disparate treatment discrimination cases, is one made "at least in part 'because of,' not merely in 'spite of,' *its adverse effects upon an identifiable group*." *Feeney*, 442 U.S. at 279. (Emphasis added.) Fulton County submitted a proposed instruction tracking the language of *Feeney*, but the District Court rejected it.[7]

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[7] In response to the jury's request, Fulton County submitted a proposed instruction which included the following language:

> I charge you that "intent," as used in this case to mean discriminatory intent, means that a decisionmaker selects a particular course of action at least in part "because of" its

(Continued on following page)

On the facts of this case, the difference between taking a course of action because of "race" and because of "its adverse effects upon an identifiable group" is significant. Many decisions might be made on the basis of race, without being made, even in part, because of adverse effects on an identifiable group. Here, Ben Edwards' race was a factor because he had made a complaint of discrimination on the basis of his own race. But, that is a far different determination than a finding that Cooper took action in part because of its adverse effects on white people – a finding which the jury never made or had the chance to make, due to the erroneous instruction. *See*, *Auriemma v. Rice*, 910 F.2d 1449, 1463 (7th Cir. 1990) (Cudahy, J., dissenting) ("Because this is really a political case and because Rice, in order to benefit members of the 'black' party, had – by definition – to take actions that adversely affected whites, I cannot find the requisite discriminatory intent here. In short, Rice acted, not *because* he wanted to hurt whites, but 'in spite of' the fact that he was hurting whites," citing *Feeney*.).

The difference between "race" and "adverse effects upon an identifiable group" frames the precise dilemma that Fulton County faced in responding to Ben Edwards' complaint, and it offers the distinction to solve the dilemma. Almost any action that a governmental entity

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adverse effects upon an identifiable group. Discriminatory intent does *not* occur if a decisionmaker selects a particular course of action merely "in spite of" its adverse effects upon an identifiable group. The identifiable group in this case is white persons.

(Tr. Transcript 1170-1174.)

might take to respond in good faith to and remedy a complaint by one vendor of race discrimination could be said to be taken in part because of race, *i.e.*, the race of the complainant. A governmental entity should not be liable for intentional discrimination if that good faith response is taken with the intent of providing a remedy to the complainant, and is not taken with the intent of having adverse effects on a group of a different race. On the other hand, if a government's intent is to have adverse effects on the different race, then a finding of liability is warranted.

The jury apparently believed that consideration of Edwards' race was all that was necessary to find intentional discrimination on the part of Cooper and Fulton County, because it found, in response to another one of the special interrogatories, that Cooper intentionally discriminated against WGT "in a good faith effort to respond to a nonfrivolous complaint by another contractor of discriminatory treatment." Pet. App. 64. The jury never made a finding, either directly or by implication, that Fulton County's intent, through Cooper, was to have an adverse effect on white people, including WGT's owner.

The second reason that the supplemental instruction conflicted with this Court's decision in *Feeney* was that it informed the jury that intentional discrimination is *less than* "racial animosity, ill will, enmity or hostility" or "invidious hostility or animus." It did not, however, as Fulton County requested, inform the jury that intentional discrimination requires *more than* a decisionmaker's simple act of making a choice or his awareness of consequences. Tr. Transcript 1174. This Court has stated that "discriminatory purpose" "implies more than intent as volition or intent as an awareness of consequences."

Feeney, 442 U.S. at 279. The erroneous instruction therefore emphasized those elements that WGT did *not* have to prove in order to prevail on the issue, without mentioning those elements that it *did* have to satisfy.

The District Court's erroneous instruction virtually compelled the jury to find discriminatory intent. Cooper selected a course of action – to make communications to ensure that Edwards would be treated fairly – at least in part because of Ben Edward's race, not Peggy Webster's race. The flawed jury instruction led the jury to believe that that fact was all it had to believe in order to find discriminatory intent, and that fact was not in dispute. This highly prejudicial result for Fulton County demonstrates that review is warranted.

III. AS A MATTER OF LAW, LIABILITY SHOULD NOT BE IMPOSED ON A GOVERNMENT ENTITY WHERE ITS GOOD FAITH EFFORT TO REMEDY A CLAIM OF RACE DISCRIMINATION MADE BY ONE CONTRACTOR RESULTS IN A COUNTERVAILING CLAIM OF RACE DISCRIMINATION MADE BY A CONTRACTOR OF ANOTHER RACE.

The District Court posed a special verdict question to the jury in this case: "Did the defendant Michael Cooper intentionally discriminate against the Plaintiff on the grounds of race in a good faith effort to respond to a nonfrivolous complaint by another contractor of discriminatory treatment?" The jury's answer was "yes." Pet. App. 64. Thus, even though the jury's conclusion that Cooper intentionally discriminated against WGT was based on an erroneous understanding and an easy-to-satisfy standard of "discriminatory intent," it nevertheless found as a fact

that he acted in good faith to remedy BEL's complaint of race discrimination. The County moved the District Court pursuant to Fed.R.Civ.P. 50 for judgment as a matter of law, but the motion was denied, and the Eleventh Circuit affirmed without discussion.

The jury's finding of good faith by the one person whose actions could have created liability for Fulton County[8] is fundamentally at odds with a verdict of intentional discrimination and the imposition of liability on the County. The contradictory findings of the jury raise an important federal question that has not been, but should be, settled by this Court: "If a fact-finder in a disparate treatment case finds that a government defendant acted with discriminatory intent but also finds that it acted in good faith, is it impermissible as a matter of law to impose liability on that governmental entity?" This Court has previously granted certiorari in a matter in which the judgment as a matter of law turned on proof of intent, *see*, *Reeves*, 530 U.S. at 150, and Fulton County asks this Court to do the same on this related issue.

This unresolved federal question is especially important in the situation presented here. Cooper faced a complaint of race discrimination by Ben Edwards, the African-American owner of BEL. As the jury found, Cooper acted in good faith to remedy that complaint. In doing so, however, he offended a white contractor, WGT, who was competing for the same work as Edwards. WGT then filed

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[8] WGT's theory of liability against Fulton County was that its liability was premised upon the acts of Michael Cooper. Tr. Transcript 1085-1086.

this reverse race discrimination lawsuit. Mr. Edwards' company also filed its own race discrimination lawsuit against the County, a lawsuit which was ultimately unsuccessful. Tr. Transcript 669-673.

The only way for the County to have avoided liability in both cases was for Cooper to guess correctly in advance of any litigation which contractor would ultimately be held to have a valid complaint and to remedy only that contractor's claim. Since guessing the actual outcome of litigation is difficult at best, the lesson the County could take away from this situation would be to take no corrective measures at all in response to any contractor's complaint of race discrimination. The County contends, however, that it should not have to litigate every complaint of race discrimination and be held liable for it, before taking corrective action. Moreover, the County had a constitutionally valid non-discrimination policy.[9] If that policy was to mean anything, the County was bound to follow its provisions and to act promptly to correct any perceived violations of its terms.

Faced with Edwards' complaint, the jury found that Cooper acted in good faith to remedy it. Such a finding of good faith should be enough to protect the County from liability to WGT. *Cf. Bullington v. United Airlines, Inc.*, 186 F.3d 1301 (10th Cir. 1999) ("The relevant inquiry is not whether [defendant's] proffered reasons were wise, fair

[9] "[T]he policy of Fulton County Government [is] to promote full and equal access in contracting and procurement opportunities for all business in Fulton County." WGT Exhibit 1.

or correct, but whether [defendant] honestly believed those reasons and acted in good faith upon those beliefs.")

Although this Court has not resolved the question that is presented here, Justice O'Connor acknowledged the quandary that government bodies face in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 289-93 (1986) (O'Connor, concurring). As she noted:

> . . . [P]ublic employers are trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action is taken. Where these employers, who are presumably fully aware both of their duty under federal law to respect the rights of all their employees and of their potential liability for failing to do so, act on the basis of information which gives them a sufficient basis for concluding that remedial action is necessary, a . . . requirement [that they have a court's actual finding of their own discrimination before they act] should not be necessary.

Wygant, 476 U.S. at 291 (O'Connor, J., concurring). Justice O'Connor recognized the government entity's "Catch-22" situation and suggested, in essence, that a good faith defense should apply. Both the courts and the government have encouraged remedial programs as a means to eliminate discrimination, *see*, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764 (1998), but without a good faith defense, there is a strong disincentive to use such programs.

At the time of trial in this case, the Eleventh Circuit had recognized that a conclusion of intentional discrimination is fatally inconsistent with a finding that an official

acted in good faith to remedy race discrimination. In *Citizens Concerned About Our Children v. School Board of Broward County, Florida*, 193 F.3d 1285, 1295 (11th Cir. 1999), *r'hrg and r'hrg en banc denied*, 211 F.3d 596 (2000), the Eleventh Circuit affirmed a grant of summary judgment for lack of evidence of discriminatory intent where the allegedly discriminatory actions taken by the defendant school board were made in the context of a good faith attempt to desegregate schools. The Eleventh Circuit stated, "This evidence does not support an inference of discriminatory intent. (Indeed, if anything this evidence depicts a well-meaning Board tiptoeing through a racial minefield.)" At the time of the two incidents that WGT challenges as discriminatory, Fulton County was in precisely the position of the Broward County School Board, attempting to navigate the racial minefield created by its obligation to remedy Edwards' claim of race discrimination.

At least one other federal court has agreed that the concepts of intentional discrimination and good faith are fatally inconsistent. *See, e.g., Anderson v. Wilson Area School District*, 1985 WL 5042, *2 n.2 (E.D. Pa. 1985) ("We can think of no instance in which a fact-finder could conclude a defendant in an age or sex discrimination case under Title VII or ADEA acted with the necessary discriminatory intent where disparate treatment is alleged but find at the same time that the defendant acted in good faith. This Court believes those concepts to be mutually exclusive.").

The District Court's failure to grant Fulton County's Rule 50 motion and the Eleventh Circuit's affirmation of that ruling show that neither court applied the principles enunciated in these two cases, however. Because it is

inconsistent for a fact-finder in a disparate treatment case to conclude that the defendant acted with the necessary discriminatory intent and also to conclude that he acted in good faith, Fulton County requests that this Court determine as a matter of law that it is impermissible to impose liability on Fulton County and further requests this Court to remand the case for entry of judgment in the County's favor.

IV. THE DISTRICT COURT'S ERRORS LED THE JURY TO USE A PRESUMPTION THAT WGT WAS A VICTIM OF A PATTERN OR PRACTICE OF RACIAL DISCRIMINATION, INSTEAD OF REQUIRING PROOF OF THE COUNTY'S ACTUAL DISCRIMINATORY INTENT AGAINST THIS PARTICULAR PLAINTIFF UNDER THE PARTICULAR CIRCUMSTANCES OF ITS REMEDIAL EFFORTS TO ADDRESS BEL'S RACE DISCRIMINATION COMPLAINT.

The District Court gave a detailed instruction to the jury, both at the beginning and the end of the evidence, that it had previously found the goals portion of the MFBE Program to be unconstitutional and illegal and that the jury must find that the Court was "correct" as to that ruling. Tr. Transcript 72-84, 1150-1151. The lower court also permitted WGT to introduce extensive evidence about the implementation of the MFBE Program and its general effect upon the bid process as relevant evidence of an official policy of discrimination. Pet. App. 56-58; Pet. App. 59-60. This instruction and the admission of such evidence led the jury to presume without proof that WGT was the victim of a pattern or practice of unlawful racial discrimination and to substitute the existence of the County's "official policy" of discrimination through its affirmative

action plan for any real evidence of intent to discriminate against this particular plaintiff under the particular circumstances of the case. Such a presumption and substitution is in conflict with *International Brotherhood of Teamsters v. United States*, and its progeny. When coupled with the District Court's erroneous instruction on the meaning of intent, the prejudice to Fulton County was extreme.

According to this Court's decision in *Teamsters* and its progeny, an individual plaintiff is *not* entitled to a presumption that any decision made about himself, relating to the subject matter of an unlawful, discriminatory pattern, practice or policy, was made in pursuit of that policy. Such a presumption is available only in a class action or a suit brought by the government under the pattern or practice section of Title VII, 42 U.S.C. §2000e-6(a), and, even then, only when the court finds a "pattern or practice" of discrimination. *Teamsters*, 431 U.S. at 324, 359, 360-62; *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1132 (11th Cir. 1984); *Perryman v. Johnson Products Co.*, 698 F.2d 1138, 1143 (11th Cir. 1983); *Scarlett v. Seaboard Coast Line R.R.*, 676 F.2d 1043, 1053 (5th Cir. 1982); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 759-761 (4th Cir. 1998); *Gilty v. Village of Oak Park*, 919 F.2d 1247, 1252 (7th Cir. 1990); *Hervey v. City of Little Rock*, 787 F.2d 1223, 1231 (8th Cir. 1985).

WGT was an individual plaintiff, not a class plaintiff or class member, and this was not a suit brought by the government under 42 U.S.C. §2000e-6(a). WGT was therefore not entitled to a presumption of discriminatory treatment and was required to prove each element of its case, especially the critical element of discriminatory intent. As the Eleventh Circuit has held, but failed to

apply to this lawsuit: "Although a case of classwide discrimination might be made out by 'compelling independent evidence of a pattern or practice of discrimination', in an individual case 'each plaintiff bears the burden of proving that each employment decision that adversely affected him or her was the product of a discriminatory motive'." *Carmichael v. Birmingham Saw Works*, 738 F.2d at 1132 (quoting *Perryman v. Johnson Products Co.*, 698 F.2d at 1143).

By hearing that the goals portion of the MFBE Plan was unconstitutional and illegal, from the same judge who had held the goals unconstitutional and illegal, the jury was erroneously led to believe that, simply through the existence of the Plan, Fulton County intended to discriminate against WGT. Two facts indicate that the jury was confused about the issue of intent and believed that it was not required to make a causal connection based on evidence between the goals portion of the MFBE Plan and Cooper's actions that allegedly impacted WGT. First, as discussed above, the jury interrupted its deliberations to ask for a special instruction on the meaning of discriminatory intent. Second, as also discussed above, the jury found, inconsistently, that Cooper intentionally discriminated against WGT on the grounds of race but that he acted in a good faith effort to respond to Edwards' complaint of discriminatory treatment.

Since the *Teamsters* decision does not permit a method of proof based on presumption in a case of this type, Fulton County asks this Court to correct the erroneous method of proof created by the admission of the MFBE

evidence and the MFBE instruction and to remand for retrial excluding the evidence and instruction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PENN PAYNE
Counsel of Record

DOROTHY YATES KIRKLEY
KIRKLEY & PAYNE, LLP
999 Peachtree Street, Suite 1640
Atlanta, Georgia 30309
Telephone: (404) 892-8781
Facsimile: (404) 892-3662

OVERTIS HICKS BRANTLEY
JUNE GREEN
OFFICE OF THE FULTON
COUNTY ATTORNEY
141 Pryor Street, S.W., Suite 4308
Atlanta, Georgia 30303
Telephone: (404) 730-7750

Dated: September 23, 2002

APPENDIX

[PUBLISH]

IN THE UNTIED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-11644

(Filed February 28, 2002)

D. C. Docket No. 96-02399 CV-TWT-1

DANIEL WEBSTER,
PEGGY WEBSTER, et al.,

Plaintiffs-Appellants,
Cross-Appellees,

versus

FULTON COUNTY, GEORGIA,

Defendant-Appellee,
Cross-Appellant.

No. 00-15227

D. C. Docket No. 96-02399 CV-TWT-1

DANIEL WEBSTER,
PEGGY WEBSTER, et al.,

Plaintiffs-Appellants,
Cross-Appellees,

versus

FULTON COUNTY, GEORGIA,

Defendant-Appellee,
Cross-Appellant.

Appeals from the United States District Court
for the Northern District of Georgia

(February 28, 2002)

Before EDMONDSON and WILSON, Circuit Judges, and PAUL* District Judge.

EDMONDSON, Circuit Judge:

Webster Greenthumb Co.'s ("WGT") amended complaint alleges that WGT, since filing a section 1981 lawsuit charging Fulton County with a custom or policy of disparate-treatment racial discrimination, has "bid upon several contracts, for which they were the lowest qualified bidder" and that Fulton County "refused to award these contracts to [WGT] in retaliation for having filed th[is] lawsuit."[1] The question before us is whether the district court erred when it determined that WGT – an independent contractor – failed to allege a valid section 1981

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* Honorable Maurice M. Paul, U.S. District Judge for the Northern District of Florida, sitting by designation.

[1] When reviewing a dismissal for failure to state a claim, we take the allegations in the complaint as true and draw all reasonable inferences in favor of WGT. *E.g., Marsh v. Butler County,* 268 F.3d 1014, 1023 (11th Cir. 2001) (en banc).

retaliation claim. We believe the district court did err, and we vacate the district court's order of dismissal. [2]

Section 1981 provides that "[a]ll persons . . . shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). Section 1981 protects people, and some entities,[3] from racial discrimination during the making of contracts. *See Patterson v. McLean Credit Union,* 491 U.S. 164, 176-77, 109 S. Ct. 2363, 2372-73 (1989) (stating that Section 1981 "prohibits, when based on race, the refusal to enter into a contract with someone"), *superseded by statute on other grounds as stated in Landgraf v. USI Film Prods.,* 511 U.S. 244 (1994). Section 1981 is enforceable against a municipality through 42 U.S.C. § 1983.[4] *See Butts v. County of Volusia,* 222 F.3d 891, 894 (11th Cir. 2000) (concluding that Section 1983 is exclusive remedy for enforcement of Section 1981 rights against state actors).

We have previously concluded that Section 1981 supports a retaliation cause of action. *Andrews v. Lakeshore Rehab. Hosp.,* 140 F.3d 1405, 1412-13 (11th Cir.

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[2] Many other issues were raised on appeal. We affirm the district court's decisions, except for its decision dismissing WGT's retaliation claim.

[3] In a situation such as the one presented by this case, Section 1981's protections extend to companies such as WGT. *Gersman v. Group Health Ass'n, Inc.,* 931 F.2d 1565 (D.C. Cir. 1991) (concluding that corporation discriminated against on the basis of the race of its principal shareholder has standing to assert section 1981 violation), *vacated on other grounds,* 502 U.S. 1068 (1992), *reinstated* 975 F.2d 886 (D.C. Cir. 1992).

[4] WGT brought its section 1981 claims pursuant to Section 1983.

1998). But in this case, the district court – relying on *Board of Comm'rs v. Umbehr,* 518 U.S. 668, 116 S.Ct. 2342 (1996) – accepted the County's contention that Section 1981 could not support a retaliation claim that was based upon WGT's factual allegations and, therefore, determined that WGT had failed to state a section 1981 retaliation claim.

The County's argument to affirm on appeal seizes on two differences between the facts presented to the *Andrews* court and the facts in this case. First, the plaintiff in *Andrews* was an employee of a private company, not an independent contractor for a governmental entity, as is WGT. Second, the plaintiff in *Andrews* was terminated from his job. Fulton County contends that WGT, on the other hand, was not hired (that is, was not awarded the contracts at issue) in the first place. The County then points to the reasoning of *Umbehr* to support distinguishing *Andrews* from this case (and, thus, support concluding that WGT failed to state a section 1981 retaliation claim) based upon those two differences.

In *Umbehr,* the Supreme Court recognized a section 1983 retaliation cause of action against a municipality for independent contractors whose contracts had been terminated in retaliation for exercising their freedom of speech. The opinion, however, was explicitly limited to independent contractors with pre-existing contractual relationships with the government. *Umbehr,* 518 U.S. at 685, 116 S. Ct. at 2352. At least one other circuit has interpreted *Umbehr* to prohibit First Amendment retaliation claims, brought pursuant to Section 1983, by independent contractors without pre-existing relationships (that is, "disappointed bidders"). *McClintock v. Eichelberger,* 169 F.3d 812, 817 (3d Cir. 1999). Fulton County argues that *Umbehr*'s alleged

prohibition on suits by disappointed bidders should apply to race-based section 1981 retaliation claims brought under Section 1983. We disagree.

Umbehr does not apply to the case at hand.[5] *Umbehr* drew its distinction between independent contractors and employees in the context of the First Amendment, not Section 1981. Disappointed bidders are at the core of Section 1981's protection: Section 1981 is a protection against an entity (such as Fulton County) declining to make a contract with a party (such as WGT) on account of race. Thus, once we say that Section 1981's protection extends to prohibiting retaliation against a party who has filed a formal complaint charging racial discrimination (as we did in *Andrews*),[6] it follows that having no contract (that is, being a disappointed bidder) is no bar, but actually an element of a traditional section 1981 retaliation claim alleging failure to contract.

We, therefore, conclude that an independent contractor, such as WGT, states a claim for violation of Section 1981 when that contractor – a contractor that is qualified

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[5] The case *decided* nothing about the right of disappointed bidders to bring retaliation claims, even those based upon the First Amendment.

[6] In *Andrews,* the defendant's retaliatory acts were in response to the plaintiff's filing of a race-based claim with the EEOC. *Andrews,* 140 F.3d at 1412. We see no difference, for purposes of this case, between the filing of a raced-based EEOC claim (as in *Andrews*) and the filing of a race-based section 1981 lawsuit (as in this case).

to do the work upon which it bids[7] – alleges that a governmental entity refused to award a contract to the contractor in retaliation for the contractor's filing of a lawsuit charging the governmental entity with a custom or policy of disparate-treatment racial discrimination that was applied against the contractor in violation of Section 1981.[8] Thus, because WGT alleged such a claim, we conclude that WGT stated a valid section 1981 retaliation claim, as enforced by Section 1983.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

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[7] *See Mitchell v. Baldrige,* 759 F.2d 80, 86 n.5 (D.C. Cir. 1985) ("In cases of alleged retaliatory . . . failure to hire . . . , the plaintiff must also show as part of the prima facie reprisal case that he was qualified for the position.").

[8] We assume, because Fulton County has not argued otherwise, that Section 1983's additional constraint on section 1981 claims against governmental entities – that the discrimination complained of be a custom or policy of the governmental entity, *see Monell v. Department of Social Services of New York,* 436 U.S. 658, 694-95, 98 S.Ct. 2018 (1978) – is met by WGT's allegation that the retaliation at issue was in response to a lawsuit charging the County with discriminating against WGT on the basis of an unconstitutional affirmative action program.

44 F.Supp.2d 1359

United States District Court,
N.D. Georgia,
Atlanta Division.

Daniel WEBSTER, et al., Plaintiffs,
v.
FULTON COUNTY, GEORGIA, et al., Defendants.

No. Civ.A. 1:96CV2399TWT.

Feb. 12, 1999.

Richmond Mason Barge, Parks Chesin & Miller, Atlanta, GA, *Patrick W. McKee*, McKee & Barge, Atlanta, GA, for, plaintiffs.

Linda T. Walker, Office of Fulton County Attorney, Atlanta, GA, *Keith Mark Wiener*, Holland & Knight, Atlanta, GA, for Fulton County, Georgia, defendant.

J. Scott Carr, Altman Kritzer & Levick, Atlanta, GA, Linda T. Walker, Office of Fulton County Attorney, Atlanta, GA, *Keith Mark Wiener*, Holland & Knight, Atlanta, GA, for Mitch J. Skandalakis, Michael Hightower, Nancy A. Boxill, Emma I. Darnell, Gordon L. Joyner, Tom Lowe, Robert E. Fulton, defendants.

ORDER

THRASH, District Judge.

This is a complex race and sex discrimination case brought pursuant to 42 U.S.C. §§ 1981, 1983, and the Equal Protection Clause. It is before the Court on the (1) Plaintiffs' Motion for Summary Judgment [Doc. No. 103]; (2) Defendants' Motion for Summary Judgment [Doc. No. 105]; and (3) Defendants' Motion to Strike the Affidavit of

Thomas Bruns [Doc. No. 119]. For the reasons set forth below, the Court will (1) deny the Plaintiffs' Motion for Summary Judgment; (2) grant in part and deny in part the Defendants' Motion for Summary Judgment; and (3) deny the Motion to Strike the Bruns Affidavit.

I. BACKGROUND

The Plaintiffs bring this action on behalf of themselves and others similarly situated to redress the alleged deprivation of rights under 42 U.S.C. § 1981 and the Equal Protection Clause, as enforced by 42 U.S.C. § 1983. The Plaintiffs also assert state claims under the Georgia Constitution and O.C.G.A. § 48-5-220. The named Plaintiffs are Daniel Webster (white male), Peggy Webster (white female), Kelly Goff (white male) and The Webster Green Thumb Company ("Green Thumb"). The Defendants consist of (1) Fulton County; (2) individual members of the Fulton County Board of Commissioners ("Board"); and (3) Michael Cooper, Director of the Department of Contract Compliance and Equal Employment Opportunity ("Department") for Fulton County. Plaintiffs claim that the Defendants discriminated against them because of their race and gender. Their principal claim is that Fulton County operates an illegal Minority and Female Business Enterprise program that favors minorities and females in the award of contracts for goods and services.

Fulton County adopted its first minority business enterprise program in 1979. (Doc. No. 103, Exh. B). The Board at that time resolved to begin an affirmative action program with a goal that at least 20% of all County public contracts be awarded to minority bidders. (*Id.*). The Board passed resolutions continuing the program in 1984 and

1987. The 1987 resolution established the Office of Contract Compliance and Equal Employment Opportunity. In 1988, Defendant Cooper was hired as its first Director. In 1989, the Board commissioned Dr. Andrew F. Brimmer and Dr. Ray Marshall to conduct a fact-finding study relating to the participation of minorities and females in the Fulton County marketplace. Dr. Brimmer and Dr. Marshall also studied whether discrimination against minority-owned and female-owned business enterprises ("MFBE's") has reduced their participation in the public and private sector contracting and procurement activities in the Atlanta and Fulton County marketplace. (Doc. No. 105, Second Cooper Aff. ¶ 3). In 1990, Dr. Brimmer and Dr. Marshall produced and submitted to the County and City of Atlanta the Brimmer-Marshall Study which consisted of eight volumes entitled: "Public Policy of Minority Economic Development." Dr. Thomas Boston, an economics professor, prepared a report for the Brimmer-Marshall Study entitled "Discrimination and Economic Development: Effects on Minority and Female Business Enterprises." (Doc. No. 105, Boston Aff., Exh. B). According to Dr. Brimmer and Dr. Marshall, the Boston report (contained in Part III of the Study) shows that MFBE's have experienced inequitable treatment and discrimination in obtaining contracts in Fulton County and the City of Atlanta in both the public and private sectors.

In 1992, the Board passed resolutions accepting the findings of the Brimmer-Marshall Study. In 1992, Fulton County conducted open public hearings in which numerous individuals provided further anecdotal evidence regarding their experiences in the Fulton County contracting and procurement activities and practices in the Atlanta/Fulton County marketplace. On October 21, 1992,

the Board authorized the implementation of a MFBE Program under the auspices of Defendant Cooper as the Director of the Department. (Doc. No. 105, Second Cooper Aff. at ¶ 5, Exhs. A and B). In 1994, the Board engaged Dr. Boston to conduct a post-disparity-study. Dr. Boston submitted this study to the Board in June, 1994. In the post-disparity study, Dr. Boston noted significant-improvements since the Brimmer-Marshall Study as reflected by "increased utilization percentages for minority and female vendors, significant improvements in the operation of the Offices of Contract Compliance and the Purchasing Department, and the centralization of purchasing activities." (Doc. No. 105, Boston Aff., Exh. C). However, the report also noted problem areas such as the low utilization of minority and female vendors on commodity and supply contracts. (*Id.*). As a result, Dr. Boston recommended in the post-disparity study that bid preferences be given to minority and female vendors in connection with commodities and supplies contracts. (*Id.*).

Dr. Boston appeared before the Board and described the benefits of the MFBE program. These included the stimulation of minority and female entrepreneurship, and facilitating the "growth and the diversification, as well as the employment and financial capacity of [MFBE] firms." He stated that MFBE programs of the City of Atlanta, Fulton County and MARTA were "primarily responsible for the fact that now the black-owned businesses in the metropolitan area currently have the highest rate of business formation of any metropolitan area in the country." He summarized his recommendations from the post-disparity study as follows: (1) the MFBE Program remains warranted due to the fact that the present effects of past discrimination have not been remedied; (2) the scope of

contract awards reported to the Board should be altered to include a broader range of awards; (3) contract awards should be reported at three levels: above $20,000, below $20,000, and all awards; (4) the format for reporting utilization figures should be completely revised; (5) the uniform contract sign-off sheet should be altered to get detailed information regarding gender and ethnicity; (6) minority and female utilization on commodities, supplies, and contracts under $20,000 should be increased; (7) strong consideration should be given to instituting preferences for local Fulton County firms; and (8) a methodology should be developed for setting MFBE goals that are based on the availability of minority and female firms and the amount of discrimination. (Doc. No. 105, Second Cooper Aff., Exh. C).

The Board approved and adopted Dr. Boston's post-disparity study on June 15, 1994. The Board then directed that the Department implement amendments to the MFBE Program based on the post-disparity study. On July 20, 1994, the Board passed a resolution adopting certain amendments to the MFBE Program based upon the post-disparity study. Defendant Cooper combined the approved amendments with the existing MFBE Program, resulting in the 1994 Fulton County MFBE Program. (Doc. No. 105, Second Cooper Aff., Exh. G). Thus, the Board established the 1994 MFBE Program to alleviate the effects of past and present discrimination against minority and female business enterprises and to enhance contracting opportunities for those minority and female businesses. (*Id.* at 2). The Board concluded that there were no reasonable race and gender neutral policies available to accomplish these objectives. (*Id.* at 9-10).

The 1994 MFBE Program set forth the following annual business participation goals for the following groups: (1) African-American business enterprises – 26%; (2) Hispanic business enterprises – 1%; (3) Asian-American business enterprises – 1%; (4) Native American business enterprises – 1%; and (5) Female business enterprises – 6%. (*Id.* at 16-17). The MFBE Program provided that these goals were in effect for five years and are subject to an annual review and adjustment by the Department and approval by the Fulton County Manager and Board. (*Id.* at 17). Pursuant to the MFBE Program, the participation goals for minority and female business enterprises are not considered to be fixed quotas. (*Id.* at 19). The participation goals for each project or contract are set by the Department's Director based on the following non-exclusive list of factors: (1) the number of minority and female business enterprises known to be available for the type and value of service to be obtained; (2) a forecast of all eligible contracts to be awarded within the coming fiscal year, specifying the type and value of goods and services to be obtained; (3) the minority and female business enterprise percentages of the total number of business entities known to be available for the type and value of goods and services to be obtained; (4) the statistical and data sources by which each goal was calculated; and (5) the statistical and data sources from the 1994 post-disparity study. (*Id.* at 18-19).

The MFBE Program further provided that the good faith efforts of a potential contractor to meet minority and female business participation goals shall be considered in deciding contract awards. (*Id.* at 19). These good efforts include, but are not limited to: (1) attendance at pre-bid meetings which are scheduled to inform minority and

female business enterprises of prime and subcontracting opportunities; (2) advertisements in general circulation media, trade association publications, and minority and female enterprise media to provide notice of opportunities; (3) written notice to known minority and female business enterprises soliciting their interest in opportunities; (4) efforts made to select portions of work for minority and female businesses subcontracting in areas likely to be successful; (5) efforts to negotiate with minority and female businesses for specific subcontracting; (6) efforts made to assist minority and female businesses to meet bonding, insurance, or other governmental contracting requirements; (7) a statement of reasons why a particular minority or female business enterprise contacted is not qualified for a contract; and (8) communication with the Department seeking assistance for identifying minority and female business enterprises. (*Id.* at 19-20, 34-35). An Invitation to Bid ("ITB") for a contract over $20,000 contains a short form description of the MFBE Program, including a part where the bidder must demonstrate his good faith efforts by completing a checklist documenting any good faith efforts. (*See* Doc. No. 103, Exh. E).

The MFBE Program provided that it applied "to the totality of Fulton County procurement and contracting, including construction and the acquisition of all commodities, equipment, goods and services (including professional services), however titled and irrespective of the modality or manner procured, and irrespective as to whether purchased or leased." (Doc. No. 105, Second Cooper Aff., Exh. G at 22). Accordingly, the initial categories established by the Board that were encompassed under the MFBE program were listed as (1) construction; (2) commodities; (3) services; and (4) professional services. (*Id.* at

22-23). Fulton County reserved the right to amend these categories upon recommendation by the Fulton County Manager and the Board. (*Id.* at 22).

The 1994 MFBE Program provided that the Department shall evaluate and set appropriate minority or female business participation goals for each specific project or contract. (*Id.* at 25). The Department should consider (1) the nature of the project or contract and the relevant specifications; (2) the availability of minority and female business enterprises in various industry classifications and professions which are ready and able to provide goods and services on the particular project or contract; (3) the level of participation of such firms on past projects or contracts awarded by Fulton County; and (4) other relevant factors. (*Id.* at 26). The MFBE Program proposed several methods to achieve the minority and female business participation goals as follows:

> (1) *Minority and female business enterprise solicitations on procurement purchase orders.* For all purchases, each Fulton County buyer and any other Fulton County employee having the authority to procure is required to contact at least one minority or female business enterprise bidder.
>
> (2) *Joint ventures program.* The department shall encourage, where economically feasible, establishment of joint ventures and mentor protege programs to insure prime contracting opportunities for minority or female business enterprises on eligible projects. If the prime contractor is a minority or female business enterprise or a joint venture between minority and female firms, subcontracting participation with minority and

female business enterprises shall be required on all projects exceeding $10,000,000.

(3) *Mentor/protege ventures.* The Department encourages mentor/protege programs to assist individual minority and female business enterprises in financing, bonding, construction management and technical assistance.

(4) *Minority and female business enterprise subcontracting and supplier purchasing goals on construction projects and other contracts.* The Department shall ensure the maximum practicable opportunity for minority and female business participation by requiring that all bidders on a designated project or contract comply with certain remedial measures.

(5) *Construction Subcontracting.* The department may impose a requirement that bidders wanting to serve as prime contractors on a bid for a Fulton County construction project identified under Program Scope shall subcontract with minority and female business enterprises for a stated percentage of the dollar value of the project.

(6) *Subcontractor participation.* Where a prime contractor utilizes one or more subcontractors to satisfy its minority or female business participation commitment, the prime contractor may count only expenditures to minority and female business enterprise contractors that perform a commercially useful function in the contract work.

(7) *Suppliers participation.* Where a prime contractor utilizes one or more suppliers to satisfy its minority or female business participation commitment, credit will be given toward the

applicable goal as follows: (1) 100% of the contract amount for minority and female business suppliers who manufacture the goods supplied; (2) 100% of the contract amount for minority and female business suppliers who are wholesalers warehousing the goods supplied; and (3) where an extraordinarily large portion of the contract price is for equipment or supplies, a lower project goal may be set than otherwise would be required.

(8) *Professional services.* Where Fulton County requires the utilization of professional consultants, the Department shall make knowledgeable and available minority or female business enterprises aware of opportunities to serve as primary consultants on bids.

(*Id.* at 27-33).

The 1994 MFBE Program provided that the Department's Director may grant administrative waivers where reasonable good faith efforts are established, where the situation is deemed to be an emergency, and where deemed appropriate by the Director, the Fulton County Manager and the Board. (*Id.* at 36). A bidder or offeror may seek a partial or total waiver of the project goals. The application for a waiver shall include documentary evidence of the bidder's or offeror's good faith efforts to meet the project goals and why the request should be granted. (*Id.* at 37).

The 1994 MFBE Program provided that all firms participating as either a minority or female business enterprise must be certified before the award of a bid or execution of a contract after review and evaluation as to compliance. (*Id.* at 45). In determining whether a firm is

eligible to be certified, any minority or female firm engaged in or attempting to engage in business in the Fulton County Metropolitan Statistical Area before July 20, 1994, is rebuttably presumed to have suffered past racial or gender discrimination and is therefore an eligible minority or female business enterprise. In order to be a certified minority or female business enterprise, the firm or joint venture must comply with certain eligibility standards regarding minority or female control and ownership of the firm or joint venture. (*Id.* at 47-49). The Department reviews whether there is sufficient minority or female operational or managerial control so that the firm can be certified. (*Id.* at 49-51). Finally, the 1994 MFBE program provided that it shall expire five years from its effective date. (*Id.* at 55).

Plaintiffs Daniel and Peggy Webster own and operate Green Thumb, a landscaping and tree removal service. Green Thumb, formerly known as the Family Tree, applied to Fulton County for certification in 1993 as a female business enterprise. (Doc. No. 55, First Cooper Aff. at ¶ 5, Exh. A). In the Minority/Female Business Enterprise Disclosure Statement, Peggy Webster was listed as the company's owner. (*Id.*). On December 1, 1993, Defendant Cooper, as Director of the Department, notified Peggy Webster that the Department had certified the company as a female business enterprise. (*Id.*). By letter dated March 4, 1995, Peggy Webster informed the Department that the company name had changed from the Family Tree to Green Thumb. In the letter, she requested that the company continue as a female business enterprise. (Doc. No. 55, First Cooper Aff. at ¶ 6, Exh. B). Although Green Thumb did not submit a new Minority/Female Business Enterprise Disclosure Statement, Cooper attested that the

Department did not decertify or disqualify it from the MFBE Program. (*Id.* at ¶ 7).

On March 10, 1995, Fulton County opened a bid for tree removal services for the Department of Public Works. Ben Edwards Landscaping Company ("Edwards Landscaping"), a certified minority business enterprise owned by Ben Edwards, submitted a bid for the tree removal work. (Doc. No. 105, Second Moore Aff. at ¶ 3, Exh. A). Green Thumb also submitted a bid for the tree removal work. (*Id.*, Exh. B). In its bid, Green Thumb specified that it is a female business enterprise. (*Id.*). On May 3, 1995, the Board awarded the bid to Green Thumb and Edwards Landscaping. On May 31, 1995, and June 3, 1995, Green Thumb and Edwards Landscaping were each issued Purchase Orders not to exceed $45,000. (*Id.* at ¶ 5, Exh. C). The Purchase Orders contained the following provision:

> This purchase order does not constitute an offer of or agreement by Fulton County to purchase goods and/or services for total consideration of any specific amount whatsoever. This purchase order authorizes payment for goods ordered and/or services requested by the Public Works Department/Office of Fulton County during the calendar year 1995; provides, however, that the total cost of all goods and/or services requested hereunder shall not exceed the aggregate total of $45,000 without issuance by Fulton County Purchasing Department of a written change order.

(*Id.* at ¶ 7, Exh. C). The purchase orders contained no promises or guarantees that either Green Thumb or Edwards Landscaping would receive any specific work or

any specific amounts for any specific scope of work at any specific time. (*Id.*).

In June, 1995, Bill Mowrey, Field Operations Manager for Public Works, requested quotes from Edwards Landscaping and Green Thumb to remove trees around Spalding Drive, 5821 Lake Forest, and Mount Paran Road. (Doc. No. 110, Exh. O, Tab 8). Green Thumb bid $2,500 while Edwards Landscaping bid $3,800 for the project. (*Id.*). By memorandum dated August 3, 1995, Defendant Cooper informed Fred Artis, Director of the Public Works Department, of his concern that Green Thumb had received a purchase order in the amount of $11,800 for other projects while Edwards Landscaping had not been given any work out of its original $45,000 purchase order. (Doc. No. 110, Exh. O, Tab 1). Subsequently, by memorandum dated August 9, 1995, Mr. Mowrey stated that on each project Green Thumb had provided low bids and was able to do the work while Edwards Landscaping had given excuses why it could not do the work in a timely fashion. (*Id.*, Tab 3). In a memorandum dated August 11, 1995, Mowrey reported that Edwards Landscaping failed to show up at Camp Creek to cut down six trees. (*Id.*). Nevertheless, he recommended giving Edwards Landscaping the work order to remove trees around Spalding Drive, 5821 Lake Forest, and Mount Paran Road despite the concerns over the extra costs and the ability of Edwards Landscaping to perform the work safely. (*Id.*). Mowrey's recommendation to assign that project to Edwards Landscaping was based on Cooper's August 3, 1995, memorandum. (*Id.*, Tab 8).

In 1996, the Board approved a renewal continuing the existing 1995 tree removal service arrangements with Edwards Landscaping and Green Thumb. Green Thumb

ceased being a female business enterprise when it submitted its 1996 bid for landscape maintenance. (Doc. No. 110, Exh. N, Tab 4). Due to Fulton County procedures, new purchase orders were issued to Edwards Landscaping and Green Thumb. The purchase orders were initially issued to Green Thumb in the amount of $66,000 and Edwards Landscaping in the amount of $25,000. (Doc. No. 105, Second Moore Aff. at ¶ 9, Exh. D). In a memorandum dated January 26, 1996, Defendant Cooper stated that he had received a complaint from Edwards Landscaping regarding the tree removal projects. (Doc. No. 110, Exh. O, Tab 4).

Cooper requested that Public Works provide a complete listing of all work performed by Green Thumb and Edwards Landscaping and any explanation if there was a significant difference in the amount of work performed by each company. (*Id.*). Bill Mowrey subsequently reported that Edwards Landscaping failed to meet any of the competence and safety minimum requirements and had caused property damage on the Mount Paran project. (*Id.*, Tab 6). He further stated that while he was mindful of the goals of the MFBE program, he did not believe that Fulton County was moving toward those goals with Edwards Landscaping. (*Id.*). Nevertheless, he stated that he would do his best to provide Edwards Landscaping with work where there is virtually no risk to the public. (*Id.*).

In a memorandum dated February 15, 1996, from Defendant Cooper to Frank Bockman, Acting Public Works Director, Cooper stated that he had reviewed the 1995 records which showed a discrepancy in the amount of work assigned to Edwards Landscaping and Green Thumb. (*Id.*, Tab 7). Cooper stated that Ben Edwards of Edwards Landscaping was informed that Edwards Landscaping

would not be awarded certain projects due to Mowrey's dislike of minority contractors. (*Id.*). Cooper stated that Mowrey's negative evaluation of Edwards Landscaping's work was vague and not based on any objective criteria. (*Id.*). Cooper requested that Mowrey be removed from the responsibility of assigning contracts and that Public Works honor its agreement to utilize Edwards Landscaping commensurate with the dollar value of the 1995-96 contract. (*Id.*). In a memorandum dated February 21, 1996, Mowrey responded by (1) disputing the accuracy of Cooper's February 15, 1996, memorandum; (2) recounting many shortcomings of Edwards Landscaping and its failure to carry out work assignments in a professional manner; and (3) denying any improper racial motive in assigning the work. (*Id.*, Tab 8).

Subsequently, Cooper canceled the initial 1996 purchase orders issued to Green Thumb and Edwards Landscaping based on the claim of unfair favorable treatment accorded to Green Thumb. (*Id.*, Tab 9). The 1996 purchase orders to Green Thumb and Edwards Landscaping were then reissued in equal amounts of $45,500. (*Id.*, Tabs 10, 11). Tony Moore, Budget and Revenue Manager for Public Works, informed Mowrey that both Green Thumb and Edwards Landscaping were to be used equally. (*Id.*, Tab 10). In a memorandum dated March 1, 1996, Cooper stated that it was the Department's conclusion that Public Works "did intentionally direct the tree removal service contract and its funding so as to cause a disparity in business which discriminated against the minority contractor, [Edwards Landscaping]." (*Id.*, Tab 12). Bockman responded that there was no evidence of intentional discrimination against Edwards Landscaping. (*Id.*, Tab 13). He noted that the purchase orders do not guarantee the full amount of the order. (*Id.*). In his

affidavit, Bockman states that he believes Cooper's primary concern was that Ben Edwards, the black owner of Edwards Landscaping, was not receiving as much business as the Websters, who are white. (Doc. No. 110, Exh. O, Bockman Aff. at ¶ 8).

In his affidavit, Daniel Webster testified that Mowrey had explained to him that the reduction in the 1996 purchase order was due to race. (Doc. No. 110, Exh. N, Daniel Webster Aff. at ¶ 4). Webster further stated that before the filing of the present Complaint, Green Thumb was on the Fulton County's mailing list and had frequently received post cards advising it of bids. (*Id.* at ¶ 5). However, after the filing of the Complaint, Green Thumb almost completely ceased receiving bid notifications. (*Id.*). Green Thumb never received a 1997 bid package for tree removal service despite its request and Fulton County's promise that it would receive one. (*Id.* at ¶ 8). In 1998, when Green Thumb bid on a Fulton County project for ground maintenance and was the low bid, Fulton County did not award it the contract. (*Id.* at ¶ 7).

In the Second Amended Complaint [Doc. No. 35], the Plaintiffs allege that Fulton County has, for at least two years, carried out a systematic program of awarding contracts to minority-owned businesses when other qualified businesses owned by persons who were white and/or male have submitted lower bids. The Plaintiffs allege that the discrimination also extends (1) against black-owned businesses because of their association with white persons; and (2) in favor of some white or male businesses because of their association with black persons. The Plaintiffs allege that Fulton County has operated since September 16, 1994, an unlawful affirmative action program, the MFBE Program, which unreasonably and unlawfully

burdens and discriminates against businesses based solely on the race and/or sex of the businesses' owners.

In the Second Amended Complaint, the Plaintiffs allege that Fulton County has refused on account of race to award a contract for work to Green Thumb on the Mount Paran project and instead improperly awarded it to a minority business enterprise, Edwards Landscaping, even though Edwards Landscaping was not qualified for the job and submitted a much higher bid than did Green Thumb. The Plaintiffs further allege that Fulton County, through Defendant Cooper, breached, because of race, a contract awarded to Green Thumb by reducing Green Thumb's initial 1996 purchase order by $20,500 and increasing Edwards Landscaping's initial 1996 purchase order by $20,500.

Pursuant to *Federal Rule of Civil Procedure 23*, the Plaintiffs seek certification of the following proposed class: "All persons who have placed bids to provide goods or services to Fulton County, Georgia in the two years prior to the filing of this Complaint, and have been partially or fully rejected or suffered differential treatment on account of their race (white), because of their gender (male), or because of their association with white and/or male persons." The Plaintiffs seek class certification under Rule 23(b)(2) insofar as this Complaint seeks to enjoin further implementation of the Fulton County MFBE. The Plaintiffs seek class certification under either Rule 23(b)(2) or (3) insofar as all other counts involve a "hybrid class action." Their motion for class certification is pending before the Court [Doc. No. 46].

The Plaintiffs assert in Count I of the Second Amended Complaint that the Defendants unlawfully

discriminated against the Plaintiffs on the grounds of race and sex in violation of § 1981 and the Equal Protection Clause, as enforced by 42 U.S.C. § 1983. In Counts II and III, the Plaintiffs assert that Defendant Fulton County has discriminated against the class of plaintiffs on the basis of race and sex, in violation of § 1981 and the Equal Protection Clause, by its policy, pattern or practice of discriminating on the basis of race in awarding contracts for goods and services. In Count IV, the Plaintiffs assert that the Defendants have violated the Equal Protection Clause of the Georgia Constitution, Art 1, § 1, ¶ 2. In Count V, the Plaintiffs assert that the Defendants impermissibly committed the acts in violation of O.C.G.A. § 48-5-220 to give tax money to persons for no reason other than their race. In Count VI, the Plaintiffs assert a retaliation claim under Section 1981 and the Equal Protection Clause. The Plaintiffs seek declaratory, injunctive and monetary relief.

The Plaintiffs have moved for summary judgment [Doc. No. 103] on their claims that the Fulton County MFBE Program is unconstitutional and should be enjoined. They contend that (1) a race-based preference scheme must be subjected to strict scrutiny to determine whether the program is narrowly tailored to achieve a compelling governmental interest; (2) a gender-based preference scheme must be subjected to intermediate scrutiny whereby the court analyzes whether the classification serves important governmental objectives and is substantially related to their achievement. They contend that the MFBE Program fails both tests. They contend that Fulton County has failed to show sufficient evidence of actual discrimination, whether active or passive, to justify any program of racial or gender preference. The Plaintiffs contend that the race and gender-conscious

MFBE Program is not narrowly tailored to remedy precise evidence of discrimination. Specifically, they contend that (1) Fulton County has failed to take any steps to access the impact of the MFBE Program on innocent third parties; (2) Fulton County adopted a race-based preference program without giving serious and good-faith consideration to race-neutral measures; (3) the numerical goals of the MFBE Program far exceed the availability of minorities and females in the relevant market; and (4) the MFBE Program is not sufficiently limited in either duration or geographic scope.

The Defendants have also filed a Motion for Summary Judgment [Doc. No. 105], offering numerous contentions in support of dismissing every claim asserted against them. The Defendants first contend that the Plaintiffs lack standing to assert their claims. They contend that (1) the Plaintiffs lack standing to challenge the MFBE Program; (2) the Plaintiffs lack standing to assert a practice or pattern of racial or gender discrimination by Fulton County; and (3) Plaintiff Goff lacks standing to sue for injunctive relief. The Defendants contend that the Fulton County MFBE Program is constitutional based on evidence identifying past discrimination against minority and female business enterprises. Based on the evidence presented, the Defendants contend that Fulton County had a compelling interest in remedying past discrimination and that Fulton County properly considered and implemented race and gender-neutral remedies. The Defendants contend that the MFBE Program is narrowly tailored to remedy past discrimination based on its flexibility toward reaching goals and its graduation, waiver and sunset provisions. The Defendants contend that Green Thumb and the Websters are constitutionally estopped from

challenging the MFBE Program because Green Thumb benefitted from the program as a female business enterprise. The Defendants contend that the Plaintiffs waived their right to challenge the MFBE Program by their participation. The Defendants contend that the Plaintiffs are barred from obtaining injunctive relief under the doctrine of unclean hands as they have each manipulated the MFBE Program.

The Defendants contend that the Plaintiffs are not entitled to relief against Fulton County pursuant to Section 1981, Section 1983, or the Equal Protection Clause because they have failed to establish a pattern or practice of discrimination. The Defendants contend that the Plaintiffs' claims against the individual Defendants fail due to lack of specific evidence of individual discrimination. Next, the Defendants contend that the Plaintiffs' claim against the individual Defendants in their individual capacities are barred because the individual Defendants are entitled to either absolute legislative immunity or qualified immunity. They contend that the Plaintiffs' Section 1981 claims are foreclosed because Section 1983 claims for damages constitute the exclusive federal remedy for violation of the rights guaranteed in a Section 1981 action. The Defendants contend that the Plaintiffs' retaliation claim fails due to insufficient evidence and the absence of a retaliation cause of action where the government fails to award contracts to independent contractor bidders.

The Defendants contend that the Plaintiffs have failed to establish a violation of either the federal Equal Protection Clause or the Georgia counterpart, which are coextensive. The Defendants contend that the Plaintiffs have no cause of action under O.C.G.A. § 48-5-220 because that statute does not provide either a basis for the Plaintiffs'

claim or a private right of action in general. The Defendants contend that the Plaintiffs claims against Fulton County are barred under O.C.G.A. § 36-11-1 because the Plaintiffs failed to provide the County with written notice of their claims within the specified 12-month period. The Defendants contend that punitive damages cannot be assessed against the individual Defendants because they cannot be held liable for punitive damages in their official capacities and can only be liable for punitive damages in their individual capacities if their conduct is motivated by evil motive or involves reckless indifference to the federally-protected rights of others. The Defendants contend that any damages awarded in this case should be limited under Georgia law to bid costs.

II. SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The court should view the evidence and any inferences that may be drawn in the light most favorable to the non movant. *Adickes v. S.H. Kress and Co.,* 398 U.S. 144, 158-159, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The burden then shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact exists. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 257, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986).

At the summary judgment stage, the court's function is not to weigh the evidence to determine the truth of the matter, but to determine whether a genuine issue of material fact exists for trial. *Anderson,* 477 U.S. at 249, 106 S.Ct. at 2510. "If a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant summary judgment." *Jeffery v. Sarasota White Sox, Inc.,* 64 F.3d 590, 593 (11th Cir.1995). "Where the record taken as a whole could not lead a rationale [sic] trier of fact to find for the nonmoving party," summary judgment for the moving party is proper. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

III. DISCUSSION

A. MOTION TO STRIKE BRUNS AFFIDAVIT

In their opposition to the Defendants' summary judgment motion, the Plaintiffs submitted the affidavit of Thomas Bruns, who served from 1994 through 1997 as the Deputy Director of Purchasing for Fulton County. The Plaintiffs presented Bruns' testimony as evidence of Fulton County's pattern or practice of discrimination. The Defendants have filed a Motion to Strike Bruns' Affidavit [Doc. No. 119]. They contend that the affidavit should be stricken because it (1) does not show that he has personal knowledge and fails to provide any factual foundation; (2) contains conclusory and speculative allegations; and (3) bases its conclusory allegations upon hearsay statements that are inadmissible as evidence.

Federal Rule of Civil Procedure 56(e) provides that an affidavit opposing a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Affidavits based upon "information and belief" are insufficient. *Automatic Radio Mfg. Co. v. Hazeltine Research,* 339 U.S. 827, 831, 70 S.Ct. 894, 896, 94 L.Ed. 1312 (1950). The court may consider only that evidence that would be admissible at trial. *Soles v. Board of Com'rs of Johnson County, Ga.,* 746 F.Supp. 106, 110 (S.D.Ga.1990). Thus, in determining summary judgment motions, the court will refuse to consider inadmissible hearsay. *Id.* On a summary judgment motion, the court "will disregard only the inadmissible portions of a challenged affidavit and will consider the admissible portions in determining whether to grant or deny the [summary judgment] motion." *Lee v. National Life Assur. Co. of Canada,* 632 F.2d 524, 529 (5th Cir.1980).

In the affidavit, Bruns states that in his position as Deputy Director of Purchasing for Fulton County, he "oversaw the day-to-day operations of the Purchasing Department" and "had an opportunity to observe all aspects of purchasing at Fulton County, Georgia during this time." (Doc. No. 110, Bruns Aff. at ¶ 3). The Court finds that Bruns had personal knowledge of purchasing sufficient for him to testify about the matters contained in his affidavit. The Court further finds that his testimony contains sufficient specificity about Fulton County's purchasing practices. Rather than striking the Bruns affidavit or any portions contained therein based on inadmissibility, the Court will simply disregard any

inadmissible hearsay statements and consider the admissible portions in determining whether to grant the Defendants' summary judgment motion. Accordingly, the Defendants' Motion to Strike the Bruns Affidavit is denied.

B. CONSTITUTIONALITY OF THE MFBE PROGRAM

1. STANDING

As a threshold inquiry, the Court must first consider the question of standing. Standing is a jurisdictional question, and the federal courts are under an independent obligation to analyze their own jurisdiction. *Engineering Contractors Assoc. of South Florida, Inc. v. Metropolitan Dade County,* 122 F.3d 895, 903 (11th Cir.1997), *cert. denied,* 523 U.S. 1004, 118 S.Ct. 1186, ___ L.Ed.2d ___ (1998). In addressing an affirmative action set-aside program for contractors' services, the Supreme Court has stated that:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. And in the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract. To establish standing, therefore, a party challenging a set-aside program . . . need

> only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal footing.

Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Fla., 508 U.S. 656, 666, 113 S.Ct. 2297, 2303, 124 L.Ed.2d 586 (1993).

The Court is satisfied that Plaintiffs Daniel Webster, Peggy Webster and Green Thumb have standing to challenge the constitutionality of the MFBE Program. The evidence shows that Green Thumb was a female business enterprise through 1995. Nevertheless, these Plaintiffs have demonstrated that they have bid for contracts from Fulton County in 1995 and 1996 and that the participation goals for minority business enterprises in the MFBE Program potentially prevented Green Thumb from competing on an equal footing with minority business enterprises. In the words of the Tenth Circuit addressing a similar argument:

> [W]e conclude that [Plaintiff] has demonstrated "injury in fact" because it submitted bids on three projects and the Ordinance prevented it from competing on an equal basis with minority and women-owned prime contractors. Specifically, the unequal nature of the bidding process lies in the Ordinance's requirement that a non-minority prime contractor must meet MBE and WBE participation goals by entering into joint ventures with MBEs and WBEs or hiring them as subcontractors (or satisfying the ten-step good faith requirement). In contrast, minority and women-owned prime contractors may use their own work to satisfy MBE and WBE participation goals . . . . Thus, the extra requirements impose

> costs and burdens on nonminority firms that preclude them from competing with MBEs and WBEs on an equal basis.

Concrete Works of. Colorado, Inc. v. City and County of Denver, 36 F.3d 1513, 1518-19 (10th Cir.1994), *cert. denied,* 514 U.S. 1004, 115 S.Ct. 1315, 131 L.Ed.2d 196 (1995). Contrary to the Defendants' contention, the Court further finds that the Websters and Green Thumb have standing to challenge the constitutionality of the MFBE Program as it pertains to all applications. Accordingly, the Defendants' standing argument as to the MFBE Program is without merit.[1]

In a previous Order, the Court dismissed the claims of Plaintiff Minority Distributing Corporation and Willie Hill. The Court also held that a purported assignment by Minority Distributing to Kelly Goff of the corporation's interest in this lawsuit is invalid. Goff has not shown that he individually has ever bid on a Fulton County contract or that he is likely to bid on such a contract in the future. It is well established that shareholders lack standing to bring a Section 1983 or 1981 action claiming injury to the corporation in which they own shares. *Bellows v. Amoco Oil Company,* 118 F.3d 268, 276-77 (5th Cir.1997), *cert. denied,* 522 U.S. 1068, 118 S.Ct. 739, 139 L.Ed.2d 675 (1998); *Flynn v. Merrick,* 881 F.2d 446, 449-50 (7th Cir.1989); *Forest Ambulance Service, Inc. v. Mercy Ambulance of Richmond, Inc.,* 952 F.Supp. 296, 304

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[1] The Second Amended Complaint does not state whether Green Thumb is a corporation, partnership or sole proprietorship. The parties have not addressed the implications of this and the Court will ignore this as long as the parties do so.

(E.D.Va.1997); *Sawmill Products, Inc. v. Town of Cicero,* 477 F.Supp. 636, 638-39 (N.D.Ill.1979). Goff is not even a current shareholder in the Minority Distributing Corporation. He has no standing to assert any claim in this action. Therefore, the Defendants are entitled to summary judgment as to Plaintiff Goff.

2. *CONSTITUTIONAL ESTOPPEL, WAIVER, UNCLEAN HANDS*

The Defendants contend that the Webster Plaintiffs are constitutionally estopped from challenging the MFBE Program because they benefitted from the program when Green Thumb was a certified female business enterprise. The Defendants further contend that the Plaintiffs waived their right to challenge the MFBE Program by their participation. The Supreme Court has held that "[i]t is an elementary rule of constitutional law that one may not 'retain the benefits of [a statute or regulation] while attacking the constitutionality of one of its important conditions,'" *Fahey v. Mallonee,* 332 U.S. 245, 255, 67 S.Ct. 1552, 1557, 91 L.Ed. 2030 (1947) (citation omitted). However, the Supreme Court later limited the doctrine of constitutional estoppel to situations where the plaintiff owes its very existence to the statute it challenges. *Kadrmas v. Dickinson Public Schools,* 487 U.S. 450, 456, 108 S.Ct. 2481, 2486, 101 L.Ed.2d 399 (1988). As the Supreme Court noted in Kadrmas in response to an invocation of the constitutional estoppel doctrine, "[a]ppellants obviously are not creatures of any statute, and we doubt that plaintiffs are generally forbidden to challenge a statute simply because they are deriving some benefit from it." *Id.* at 456-57, 108 S.Ct. at 2486.

In this case, the Plaintiffs clearly do not owe their existence to the creation of the MFBE Program. While they have benefitted from the program when Green Thumb was certified as a female business enterprise, the Plaintiffs are not constitutionally estopped from asserting their claim that the MFBE Program is unconstitutional. The Court also finds that the Plaintiffs have not waived their right to challenge the MFBE Program due to their participation in the program as a female business enterprise. Finally, the Defendants contend under the doctrine of unclean hands that the Plaintiffs are barred from obtaining injunctive relief with regard to the MFBE Program. The Defendants contend that the Plaintiffs misrepresented the ownership and control of Green Thumb to be eligible for female business enterprise status. The Court finds that this argument is without merit and requires no extended discussion.

3. LEGAL STANDARDS FOR SCRUTINIZING PREFERENCE PROGRAMS

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const.Amend. XIV. The Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), set forth the constitutional standard applicable for programs establishing racial or ethnic preferences. The Court applied the strict scrutiny test, which requires a "searching judicial inquiry into the justification" for the preference to determine whether the classifications are either remedial or "in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at 493, 109 S.Ct. at 721. The strict scrutiny

test is therefore designed to expose "illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool" and to "ensure that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Id.* Accordingly, the strict scrutiny test requires that racial or ethnic preference programs "must be based upon a 'compelling governmental interest' and must be 'narrowly tailored' to achieve that interest." *Engineering Contractors,* 122 F.3d at 906 (citation omitted). Explicit racial preferences may not be used except as a "last resort." *Id.* at 926.

To uphold a racial or ethnic preference program, the district court must make a factual determination that a strong basis in evidence exists to support the conclusion that the remedial racial or ethnic program is necessary. *Engineering Contractors,* 122 F.3d at 906. General, amorphous claims of societal discrimination, simple legislative assurances of good intention, or congressional findings of discrimination in the national economy are not sufficient to establish a "strong basis in evidence." *Id.* at 907. Nevertheless, a racial or ethnic preference program can be justified by demonstrating gross statistical disparities between the proportion of minorities hired for projects or contracts, and the proportion of minorities willing and able to do the work. *Id.* Anecdotal evidence may be used to establish discrimination, especially if buttressed by relevant statistical evidence. *Id.* Accordingly, if Fulton County can show that it has become a "'passive participant' in a system of racial exclusion practiced" in connection with the awards of projects and contracts in the county, the Supreme Court has made it "clear that the

[county] could take affirmative steps to dismantle such a system." *Croson,* 488 U.S. at 492, 109 S.Ct. at 721. The following four factors provide a useful analytical structure for determining whether a race or ethnicity-conscious program is narrowly tailored: (1) necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief, including availability of waiver provisions; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact on the rights of innocent third-parties. *Engineering Contractors,* 122 F.3d at 927.

Intermediate scrutiny is the applicable constitutional standard for analyzing programs that establish gender preferences. *Engineering Contractors,* 122 F.3d. at 907-08. Thus, to withstand constitutional challenge to a gender preference program, such gender preference must serve important governmental objectives and be substantially related to achievement of those objectives. *Id.* The proponent of a gender preference program must present sufficient probative evidence of discrimination. *Id.* at 910 The Eleventh Circuit recognized that the "sufficient probative evidence" standard is less stringent than the "strong basis in evidence" required to bear the weight of a race or ethnic preference program. *Id.* at 909-10. The following guidelines set forth the boundaries of intermediate scrutiny evidentiary analysis: (1) the local government must demonstrate some past discrimination against women, but not necessarily discrimination by the government itself; and (2) such review "is not to be directed toward mandating that gender-conscious affirmative action is used only as a 'last resort' " *Id.* at 910.

In making its factual determination that either a "strong basis in evidence" or "sufficient probative

evidence" exists to support the necessity of an affirmative action program, the court may consider post-enactment evidence in addition to pre-enactment evidence. *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County,* 943 F.Supp. 1546, 1557 (S.D.Fla.1996); *aff'd,* 122 F.3d 895 (1997). Pre-enactment evidence pertains to evidence developed before Fulton County enacted the MFBE Program, and thus, could have been relied upon by the Board in adopting the MFBE Program. *Id.* Conversely, post-enactment evidence pertains to evidence developed after the MFBE Program was enacted and was therefore not relied upon as a rationale for the program. *Id.* The Eleventh Circuit has held that post-enactment evidence may be introduced into the record to determine the constitutionality of a race or gender preference program:

> Although *Croson* requires that a public employer show strong evidence of discrimination when defending an affirmative action plan, the Supreme Court has never required that, before implementing affirmative action, the employer must have already proved that it has discriminated. On the contrary formal findings of discrimination need neither precede nor accompany the adoption of affirmative action.

Engineering Contractors, 122 F.3d at 911 (quoting *Ensley Branch, N.A.A.C.P. v. Seibels,* 31 F.3d 1548, 1565 (11th Cir.1994)). Consideration of post-enactment evidence is appropriate when scrutinizing race or gender preference programs because a violation of either federal statutory or constitutional requirements arises when the wrong is committed, and not with the making of a finding. *Engineering Contractors,* 122 F.3d at 911 (citing *Wygant v. Jackson Bd. Of Educ.,* 476 U.S. 267, 289, 106 S.Ct. 1842,

1855, 90 L.Ed.2d 260 (1986) (O'Connor, J., concurring)). Consideration of post-enactment evidence is especially appropriate where the principal relief sought is injunctive relief. *Engineering Contractors,* 122 F.3d at 911.

The Defendants bear the initial burden of production to demonstrate a "strong basis in evidence" or "sufficient probative evidence" that the race, ethnic or gender preference program aims to remedy past or present discrimination and is constitutional under the Fourteenth Amendment. *Engineering Contractors,* 122 F.3d at 916; *Concrete Works,* 36 F.3d at 1522. Notwithstanding this initial burden of proof, "[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Concrete Works,* 36 F.3d at 1522 (quoting *Wygant,* 476 U.S. at 277-78, 106 S.Ct. at 1849). As explained by the Eleventh Circuit in the context of public employment, once the proponent of a race preference plan:

> introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the nonminority [employees] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [public employer's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored."

Howard v. McLucas, 871 F.2d 1000, 1007 (11th Cir.1989) (quoting *Wygant,* 476 U.S. at 293, 106 S.Ct. at 1856 ((O'Connor, J., concurring)).

4. THE EVIDENCE

The Defendants have presented two types of evidence in support of the MFBE Program: (1) statistical evidence and (2) anecdotal evidence. The Court will review the evidence to determine whether the Defendants have demonstrated both the "strong basis in evidence" standard in connection with the race preference program and the less stringent "sufficient probative evidence" standard in connection with the gender preference program. The Court is mindful that this case is at the summary judgment stage, where the Court's task is not to weigh the evidence, but rather to discern whether "the record taken as a whole could not lead a rationale [sic] trier of fact to find for the nonmoving party." *Matsushita,* 475 U.S. at 587, 106 S.Ct. at 1356.

The Defendants have presented the Brimmer-Marshall Study and the 1994 post-disparity study containing statistical evidence of past discrimination against minorities and females. (Doc. No. 105, Marshall Aff., Exhs. B and C; Boston Aff., Exhs. A-K; Second Cooper Aff., Exhs. A-M). The Brimmer-Marshall Study found large disparities in public and private contracting opportunities between minority and majority firms. (Doc. No. 105, Marshall Aff., Brimmer-Marshall Study, Part I at 88). The Brimmer-Marshall Study concluded that there was low participation by minority business enterprises in Atlanta contracting relative to the value of the contracts awarded to non-minority business enterprises. (*Id.* at 99). The Study relied on the statistical criterion establishing

> a ratio of "contract dollars" going to minority business enterprises in a given year to the fraction of "available" businesses which were minority-owned in that year. This statistical

> relationship . . . [is] the "Utilization Percentage Ratio," or UPR. If the value of the resulting ratio or index is equal to 1.00, there is no discrimination; if it is significantly less than 1.00, this provides evidence of racial discrimination.

(*Id.* at 101). In the years 1972, 1977 and 1982, the resulting UPR's, or disparity indices, for black-owned businesses for the Atlanta Standard Metropolitan Statistical Area ("SMSA") and Fulton County computed under 20% for all industries and under 27% for construction and developers. (*Id.* at 103). The Eleventh Circuit has recognized that disparity indices greater than 80% are generally not considered indications of discrimination. *Engineering Contractors,* 122 F.3d at 914. The Brimmer-Marshall Study provides, therefore, some statistical evidence of discrimination in terms of disparity indices for minority business enterprises for the period between 1972 and 1982. (*Id.,* Part V).

The 1994 post-disparity study, prepared by Dr. Boston, evaluated the utilization of minority or female vendors by Fulton County from 1990-1993. (Doc. No. 105, Boston Aff., Exh. C). In this study, Dr. Boston concluded that minority and female firms totaled approximately 35% of all available firms. (*Id.,* Table 19(a)). The numbers broke down as follows: (1) African-Americans-28.6%; (2) white females – 3.55% (3) Hispanics – 1.22%; (4) Asians – 1.83%; and (5) Native-Americans – .25%. (*Id.*). The post-disparity study reflects that from 1990 through 1993, the average utilization of minorities totaled 19.63% and the average utilization of females totaled 1.43%. (*Id.,* Table 19(c)).

The study provides statistical evidence of discrimination between 1990 and 1993 in terms of the disparity indices of less than 80% for minority and female business

enterprises, provided that there is credible evidence that minority and female firms constituted 35% of all available firms. (*Id.*, Table 19(d)).

As discussed above, the Plaintiffs have the ultimate burden to show that the MFBE Program is unconstitutional. When statistical evidence is sufficient to support an inference of discrimination, the Plaintiffs have at least the following three methods to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant or actionable; or (3) present conflicting statistical data. *Engineering Contractors,* 122 F.3d at 916. The Plaintiffs have presented several reports by Dr. George Easton, who analyzed, among other things, the validity of the statistical data contained in the Brimmer-Marshall Study and the 1994 post-disparity study. (Doc. No. 110, Exh. Y). He concluded that Part V of the Brimmer-Marshall Study does not contain credible statistical evidence of underutilization of minority business enterprises in Fulton County. (*Id.*). Dr. Easton disputes the methodology of the 1994 post-disparity study as well as the study's failure to identify the source of the data used. (*Id.*). The Plaintiffs have presented a database, based on contract awards from 1990-1993, from the Fulton County Purchasing Department showing the availability of minority and female firms to be no more than 24% based upon bidding percentages, much lower than the 35% reported in the post-disparity study. (Doc. No. 103, Exh. N). Plaintiffs' expert contends that there is no credible evidence that minority and female business enterprises constitute 35% of the business enterprises in the Atlanta metropolitan area. In his Rebuttal Report, Plaintiffs' expert contends that reliable

census data shows that only 15% of available firms are minority or female owned enterprises, less than half of the set aside percentage of 35%. (Doc. 110, Ex. Y). Plaintiffs contend that Dr. Boston has admitted that the 35% figure is arrived at by adding some arbitrary figure to compensate minorities for past discrimination. This sort of speculative guesswork as to the position minorities would be in but for past discrimination is prohibited. *Engineering Contractors,* 122 F.3d at 912. Plaintiffs' expert offers statistical evidence that from 1994 to the present, minority and female business enterprises are greatly overrepresented in the award of contracts by Fulton County in relation to their availability in the marketplace. The Plaintiffs also cite the fact that the 1994 post-disparity study completely excludes commodity purchases for 1990, 1991 and 1992 and yet, Fulton County included commodity purchases in the MFBE Program.

Overall, the Defendants have presented substantial statistical evidence to support their contention that the MFBE Program was enacted to remedy past discrimination against minority and female business enterprises. The Defendants have supported this statistical evidence with anecdotal evidence of discrimination as contained in the Brimmer-Marshall Study. (Doc. No. 105, Marshall Aff., Exh. B, Part II).

Nevertheless, the Court finds that the Plaintiffs, as discussed above, have identified potential flaws in the statistical evidence propounded by the Defendants and have presented evidence that the Defendants' statistical evidence is flawed in its methodology or assumptions, and fails to support an inference of discrimination sufficient to justify a 35% set aside program. "[T]he adequacy of a

municipality's showing of discrimination must be evaluated in the context of the breadth of the remedial program advanced by the municipality." *Concrete Works,* 36 F.3d at 1522; *Croson,* 488 U.S. at 498, 109 S.Ct. at 724.

At the summary judgment stage, the Court cannot weigh the evidence and is unable to determine that the record as a whole would lead the reasonable fact finder to one inference. *See Matsushita,* 475 U.S. at 587, 106 S.Ct. at 1356. Upon examination of the entire record, the Court concludes that genuine issues of fact exist as to (1) the accuracy of the Defendants' statistical data and (2) whether either the "strong basis in evidence" or the "sufficient probative evidence" standard was satisfied to prove that the MFBE Program aims to remedy past or present discrimination.

> Either a program is grounded on a proper evidentiary factual predicate or it is not. If it is, then that program sails on to the next stage of the analysis, where each component contract measure is tested against the "narrow tailoring" and "substantial relationship" requirements. On the other hand, if a program is not grounded on a proper evidentiary basis, then all of the contract measures go down with the ship, irrespective of any narrow tailoring or substantial relationship analysis.

Engineering Contractors, 122 F.3d at 906. Therefore, it is not necessary at this stage to address the narrow tailoring and substantial relationship requirements. That can be done only after a finding at trial that the MFBE Program utilizing highly suspect racial and suspect gender preferences is based upon a proper evidentiary basis.

C. THE PLAINTIFFS' INDIVIDUAL CONSTITUTIONAL CLAIMS AGAINST THE DEFENDANTS

In the Second Amended Complaint, the Plaintiffs assert that the Defendants have discriminated against the Plaintiffs and the purported class, in violation of Section 1981 and the Equal Protection Clause as enforced by Section 1983, by its policy, pattern and practice of discriminating on the basis of race and sex in awarding contracts for goods and services. The Defendants contend that the Plaintiffs are not entitled to relief against Fulton County because they have failed to establish a pattern or practice of discrimination. The Defendants contend that the Plaintiffs' claims against the individual Defendants fail due to lack of specific evidence of individual discrimination. As an initial matter, the Defendants contend that the Plaintiffs lack standing to assert any claim that Fulton County engaged in a pattern or practice of discrimination. The Plaintiffs have alleged that the systematic awarding of contracts to minority or female business enterprises under the MFBE caused them injury in connection with the awarding of the Mount Paran project to Edwards Landscaping. The Court finds that the Plaintiffs have standing to assert their "pattern or practice" claims.

The Supreme Court has held that a local government, including a county, is liable pursuant to Section 1983 for its policies that cause constitutional violations. *McMillian v. Monroe County, Ala.,* 520 U.S. 781, 117 S.Ct. 1734, 1736, 138 L.Ed.2d 1 (1997) (citing *Monell v. Department of Social Services,* 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-38, 56 L.Ed.2d 611 (1978)). These policies may be set by the government's lawmakers or by those individuals whose actions may fairly represent official policy. *McMillian,* 117

S.Ct. at 1736. A suit against a government officer in his official capacity is the same as a suit against the entity of which the officer is the agent. *Id.* at 1736-37 n. 2. In contrast, a suit against a government official in his individual capacity seeks to impose liability upon that official for actions he takes under the color of state law. *Kentucky v. Graham,* 473 U.S. 159, 165, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985). To establish individual liability against a government official in a Section 1983 action, the plaintiff must show that the official's acts caused the deprivation of a federal right. *Id.* at 166, 105 S.Ct. at 3105. The Court concludes that the Plaintiffs properly brought suit against Fulton County and the individual Defendants in their official capacities based on the claim that the MFBE Program is illegal and the claim that there is a policy and practice of intentional racial discrimination in awarding contracts to prospective bidders.

The evidence presented demonstrates that the Board adopted and approved the MFBE Program, including the 1994 amendments. A review of the MFBE Program shows that Cooper, as the Department's Director, retains discretion to recommend participation goals for minority and female business firms, subject to Board approval, and to grant waivers to the stated goals. The Plaintiffs have presented statistical evidence from Dr. George Easton to dispute the accuracy of the statistical evidence justifying the MFBE Program's participation goals for minorities and females. The Plaintiffs have also presented anecdotal evidence showing instances where Fulton County (1) set aside contracts for minority and female business enterprises; (2) disqualified non-minority firms even where the non-minority firm is the low bidder; and (3) diverted portions of bids to higher-bidding MFBE firms, thereby

constituting discriminatory bid-splitting. (Doc. No. 110, Exhs. A, B, F, G, I, and J). The Plaintiffs have further presented evidence that Fulton County, under the direction of Defendant Cooper, impermissibly awarded a contract for work on the Mount Paran project to a minority business enterprise where Plaintiff Green Thumb was the more qualified firm for the project. (*Id.,* Exh. O). The Court finds that the totality of the evidence presented by the Plaintiffs creates genuine issues of fact as to whether Fulton County engaged in a pattern or practice of race or sex discrimination that caused injury to the Plaintiffs. Finally, the Court finds that genuine issues of material fact exist as to whether Defendant Cooper intentionally discriminated against the Plaintiffs and is liable in his individual capacity.

The Defendants contend that the acts of the individual Board members in proposing and adopting the MFBE Program are "quintessentially legislative." Thus, they contend that they are absolutely immune to suit under Section 1983. They further contend that Defendant Cooper's acts in drafting and proposing amendments to the MFBE Program were integral to the legislative process and that he is therefore entitled to absolute legislative immunity. The Supreme Court has held that legislators are entitled to absolute immunity from liability under Section 1983 for their legislative activities. *Bogan v. Scott-Harris,* 523 U.S. 44, 118 S.Ct. 966, 970, 140 L.Ed.2d 79 (1998). "Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'" *Bogan,* 118 S.Ct. at 972 (citation omitted). "[O]fficials outside the legislative branch are entitled to legislative immunity when they perform legislative functions." *Id.* at 973. An act or action is considered legislative

when it is policymaking and of general application. *Woods v. Gamel,* 132 F.3d 1417, 1420 (11th Cir.1998). Absolute legislative immunity extends to state, regional and local legislators. *Id.* at 1419. Nevertheless, not all actions taken by local legislators are entitled to absolute immunity. A decision by a local legislator which is an application of a policy to a specific party under specific facts is not protected by legislative immunity. *See Corn v. City of Lauderdale Lakes,* 997 F.2d 1369, 1392 (11th Cir.1993), *cert. denied,* 511 U.S. 1018, 114 S.Ct. 1400, 128 L.Ed.2d 73 (1994). Accordingly, the Board member Defendants and Defendant Cooper are absolutely immune from liability to the extent that the Plaintiffs seek liability for any actions taken by the Defendants in approving and adopting the MFBE Program.

The individual Defendants next contend that they are entitled to qualified immunity because the Plaintiffs cannot show that the Defendants violated clearly established law regarding administration of the MFBE Program. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The existence of Supreme Court cases or cases from this circuit recognizing a right helps determine whether the right is clearly established to a reasonably competent official. *Fortner v. Thomas,* 983 F.2d 1024, 1028 (11th Cir.1993). The principal rights allegedly

violated by the individual Defendants, the Section 1981 and equal protection rights to be free from sex and racial discrimination were clearly established at the time the Plaintiffs sought the contract award for the Mount Paran project. However, it was not clear that the administration of the MFBE Program by the Board Defendants was clearly a violation of those rights in the situation. *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1149-50 (11th Cir.1994) (*en banc*). Therefore, the individual Defendants, other than Defendant Cooper, are entitled to claim qualified immunity and are entitled to summary judgment on the Plaintiffs' discrimination claims in Counts I, II and III of the Second Amended Complaint. Defendant Cooper is not entitled to qualified immunity as to the Plaintiffs' claim that he discriminated against them because of their race in awarding contracts to Edwards Landscaping, and not to Green Thumb, and in reducing the 1996 purchase orders for tree removal.

In the Second Amended Complaint, the Plaintiffs assert a retaliation claim under Section 1981 and the Equal Protection Clause on the ground that the Defendants refused to award contracts to the Plaintiffs after Fulton County was first notified of the claims in this action. The Defendants contend that the Plaintiffs' retaliation claim fails due to insufficient evidence and the absence of a retaliation claim where the government fails to award contracts to independent contractor bidders. This Court has found no authority to support a specific retaliation claim under Section 1981 or the Equal Protection Clause for the local government's failure to award contracts to independent contractor bidders. *Cf. Board of County Com'rs v. Umbehr,* 518 U.S. 668, 685, 116 S.Ct. 2342, 2352, 135 L.Ed.2d 843 (1996) (in allowing that an

independent contractor bring a retaliation claim for retaliatory termination of an existing contract based on protected speech activities, the Supreme Court noted that such holding does not address "the possibility of suits by bidders or applicants for new government contracts"); *Ratliff v. DeKalb County,* 62 F.3d 338, 341 (11th Cir.1995) (the court recognized that constitutional claim for retaliation may be brought under Section 1983 under the First Amendment, and not the Equal Protection Clause). Accordingly, the Court finds that the Defendants are entitled to summary judgment as to the Plaintiffs' retaliation claim in Count VI of the Second Amended Complaint.

Section 1981 covers claims for intentional racial discrimination in "the making, performance, modification and termination of [employment] contracts" and in "the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." 42 U.S.C. § 1981. Success on a Section 1981 claim requires proof of intentional discrimination. *Brown v. American Honda Motor Co., Inc.,* 939 F.2d 946, 949 (11th Cir.1991), *cert. denied,* 502 U.S. 1058, 112 S.Ct. 935, 117 L.Ed.2d 106 (1992). The Defendants contend that the Plaintiffs' Section 1981 claims are foreclosed because Section 1983 claims for damages constitute the exclusive federal remedy for violation of the rights guaranteed in a Section 1981 action. In *Jett v. Dallas Independent School Dist.,* 491 U.S. 701, 109 S.Ct. 2702, 2722, 105 L.Ed.2d 598 (1989), the Supreme Court held that Section 1983 "provides the exclusive federal damages remedy for the violation of the rights guaranteed by Section 1981 when the claim is pressed against a state actor." *Id.* at 733, 109 S.Ct. at 2722. Notwithstanding this controlling authority, the Plaintiffs respond that the 1991

amendments to the Civil Rights, specifically the amendment adding subsection (c) to Section 1981, overruled *Jett* to create an express cause of action for violations of Section 1981 by state actors. Subsection (c) to Section 1981 provides that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law." Pub.L. 102-166, Title I, § 101 (1991), 105 Stat. 1071, as amended, 42 U.S.C. § 1981(c).

The Eleventh Circuit has yet to consider whether Section 1981(c) overruled *Jett*. The district courts have split as to whether *Jett* was overruled. *Cf. Johnson v. City of Fort Lauderdale,* 903 F.Supp. 1520 (S.D.Fla.1995), *aff'd,* 148 F.3d 1228 (11th Cir.1998), *with La Compania Ocho, Inc. v. United States Forest Service,* 874 F.Supp. 1242 (D.N.M.1995). This Court agrees with the well-reasoned Johnson case which concluded that subsection (c) is consistent with *Jett* and does not create an express cause of action under Section 1981. Johnson, 903 F.Supp. at 1522-23. Thus, the only means for the Plaintiffs to seek redress for rights protected by Section 1981 is through a Section 1983 action. In all of the Plaintiffs' counts asserting Section 1981 violations, they have sought relief as enforced by Section 1983. Accordingly, while the Defendants are technically correct with their argument, the Court will not dismiss any of the Plaintiffs' constitutional claims.

The Defendants correctly assert that municipalities and municipal officers in their official capacity are not liable for punitive damages. *See City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 271, 101 S.Ct. 2748, 2762, 69 L.Ed.2d 616 (1981); *Rankin v. City of Philadelphia,* 963 F.Supp. 463, 477 (E.D.Pa.1997); *Scheideman v. Shawnee*

County Bd. of County Com'rs, 895 F.Supp. 279, 283 (D.Kan.1995). Government officials sued in their individual capacities may be held liable for punitive damages upon a showing that the Defendants' conduct is "motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade,* 461 U.S. 30, 56, 103 S.Ct. 1625, 1640, 75 L.Ed.2d 632 (1983). The Defendants contend that no evidence has been presented that the individual Defendants were motivated by an evil motive or intent, or that they acted in reckless or callous indifference to the Plaintiffs' federally-protected rights. All of the individual capacity claims against the Board member Defendants have been dismissed. Therefore Fulton County and the Board member Defendants are entitled to summary judgment as to the claim for punitive damages. The Court finds that enough evidence has been presented to create genuine issues of fact as to whether Defendant Cooper should be liable for punitive damages if the jury finds that he engaged in intentional discrimination on the basis of race.

The Defendants contend that damages, to the extent they are awarded in this case, should be limited to bid costs. The Georgia Supreme Court has held that the only remedy in money damages under Georgia law for a disappointed bidder is the reasonable cost of preparation of the bid. *City of Atlanta v. J.A. Jones Constr. Co.,* 260 Ga. 658, 659, 398 S.E.2d 369, 370-71 (1990).

> When, as here, a governmental entity has frustrated the bid process and awarded the contract to an unqualified bidder, the injured low bidder may bring an action for appropriate relief. However, a low bidder whose bid is unfairly rejected

> is entitled to an award of reasonable costs of bid preparation.

Id. at 659, 398 S.E.2d at 370 (citations omitted). The Georgia Supreme Court further held that an award based on a Section 1983 claim for denial of due process constituted an impermissible double recovery. In rejecting the Defendants' contention that damages should be limited to bid costs, the Court finds that the *City of Atlanta* decision is inapposite to the present case. In contrast to the *City of Atlanta* case, the Plaintiffs here have not sought a state law recovery based on the bid process for contracts. Further, this case involves federal claims of race and sex discrimination in the award of contacts, [sic] and these claims were not present in the Georgia case. Accordingly, the Court finds any damages awarded in this case are not limited to bid costs.

D. GEORGIA EQUAL PROTECTION CLAUSE

In Count IV, the Plaintiffs assert that the Defendants have violated the Equal Protection Clause of the Georgia Constitution, Art 1, § 1, ¶ 2. In support of their summary judgment motion, the Defendants contend that the Plaintiffs are not entitled to relief under the Georgia equal protection clause. The Georgia equal protection clause and the Equal Protection Clause of the Fourteenth Amendment are coextensive. *Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc.,* 266 Ga. 393, 400, 467 S.E.2d 875, 881 (1996); *Grissom v. Gleason,* 262 Ga. 374, 376, 418 S.E.2d 27, 29 (1992). The Plaintiffs do not specify what relief, if any, over and above the relief to which they are entitled under federal law, they seek for the alleged violation of the Georgia Constitution. Therefore, the Court construes this claim as relating solely to the claim for

declaratory and injunctive relief and not to the Plaintiffs' claim for damages. Because genuine issues of fact exist as to whether the Defendants have violated the Equal Protection Clause, the Court concludes that the Defendants are not entitled to summary judgment as a matter of law as to the state equal protection claim. The Defendants' summary judgment motion as to Count IV is therefore denied.

E. O.C.G.A. § 48-5-220

In Count V of the Second Amended Complaint, the Plaintiffs assert that the Defendants impermissibly committed acts in violation of O.C.G.A. § 48-5-220 to give tax money to persons for no reason other than their race. The Defendants contend that the Plaintiffs have no cause of action under O.C.G.A. § 48-5-220 because that statute does not provide either a basis for the Plaintiffs' claim or a private right of action in general. The statute provides that "[c]ounty taxes may be levied and collected for the following public purposes . . ." and lists 22 purposes for which taxes may be levied and collected. O.C.G.A. § 48-5-220. The Court concludes that the Defendants are entitled to summary judgment on this count because (1) the statute does not prohibit or otherwise proscribe the conduct of which the Plaintiffs complain; and (2) the Plaintiffs have not cited and this Court has not found any specific authority that allows a private right of action in cases such as the instant one where the statutory scheme does not provide for one. *See Cellular One, Inc. v. Emanuel County,* 227 Ga.App. 197, 199-200, 489 S.E.2d 50, 52-53 (1997) (finding no private cause of action for an alleged violation of tax revenue regulations where none was provided for in the statute).

F. O.C.G.A. § 36-11-1

The Defendants contend that the Plaintiffs' claims against Fulton County are barred by O.C.G.A. § 36-11-1 because the Plaintiffs failed to provide the County with written notice of their claims within the specified 12-month period. This statute provides that:

> [a]ll claims against counties must be presented within 12 months after they accrue or become payable or the same are barred, provided that minors or other persons laboring under disabilities shall be allowed 12 months after the removal of the disability to present their claims.

O.C.G.A. § 36-11-1. The Court concludes that this statute does not apply to bar any of the Plaintiffs' federal and state constitutional claims contained in Counts I, II, III and IV. *See Terrell County v. Albany/Dougherty Hosp. Authority,* 256 Ga. 627, 630, 352 S.E.2d 378, 381 (1987) (the statute applies to claims arising from contract); *Norris v. Nixon,* 78 Ga.App. 769, 774, 52 S.E.2d 529, 532 (1949) (the claims intended to be barred by the statute reference claims growing out of contract or breach of duty).

IV. CONCLUSION

For the foregoing reasons, the Plaintiffs' Motion for Summary Judgment [Doc. No. 103] is DENIED. The Defendants' Motion for Summary Judgment [Doc. No. 105] is GRANTED in part and DENIED in part. The Defendants' summary judgment motion is granted as to the claims of Plaintiff Goff. The Defendants' summary judgment motion is granted with respect to Counts V and VI and these claims are DISMISSED from this case. The Defendants Skandalakis, Hightower, Boxill, Darnell,

Joyner, Lowe and Fulton are entitled to absolute and qualified immunity as to the claims against them in their individual capacities. The Court has jurisdiction as to Fulton County as an entity and there is no reason for the Board member Defendants to continue in this case solely in their official capacities. Therefore, the Defendants' summary judgment motion is granted as to Defendants Skandalakis, Hightower, Boxill, Darnell, Joyner, Lowe and Fulton. The Defendants' summary judgment motion is denied in all other respects as to Defendants Fulton County and Cooper. The Defendants' Motion to Strike the Affidavit of Thomas Bruns [Doc. No. 119] is DENIED.

Pursuant to Rule 42(b), the Court will conduct a separate bench trial upon the Plaintiffs' claim that the 1994 Fulton County MFBE Program is unconstitutional. This bench trial will be scheduled as soon as possible after the Court rules upon the Motion to Certify a Class. A separate jury trial on Plaintiffs' damage claims will follow.

SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DANIEL WEBSTER, et al., Plaintiffs, v. FULTON COUNTY, GEORGIA, et al., Defendants.	CIVIL ACTION FILE NO. 1:96-CV-2399-TWT

ORDER

(Filed Nov. 19, 1999)

This case is before the Court on the Defendants' Motion in Limine [Doc. 187]. The Defendants seek to exclude from evidence at the damages trial any reference to the Court's Order of June 11, 1999 finding the Fulton County MFBE program unconstitutional. Aside from the tangled procedural posture of this case, the issue is a simple one. Did the Defendants discriminate against the Webster Green Thumb Company because of the race and/or gender of its owner? The 1994 MFBE program authorized Fulton County to prefer contractors over other equally qualified contractors on the basis of race, gender and ethnicity. It was clear to the Court from the evidence introduced at the bench trial that the MFBE program was a pervasive factor in Fulton County contracting during the time frame involved in this case. The damages trial would take on an Alice in Wonderland quality if the Plaintiff was precluded from offering evidence as to the MFBE program. Therefore, Plaintiff should be allowed to introduce in evidence the 1994

MFBE program to show an official policy of discrimination on the basis of race and gender. Because of the Court's ruling regarding the constitutionality of the program, Fulton County cannot defend against any claim of racial discrimination on the basis of compliance with a lawful MFBE program narrowly tailored to remedy the effects of past discrimination. The Court intends to give the jury a preliminary instruction summarizing the undisputed facts regarding the creation of the 1994 MFBE program and a summary of the Court's ruling regarding its unconstitutionality. Pursuant to Rule 403 of the Federal Rules of Evidence, the Order itself will not be admitted. Nevertheless, the jury will also be instructed that Plaintiff is not entitled to recover simply because Fulton County operated an illegal MFBE program; the Plaintiff is entitled to recover only if the jury finds that it was the actual victim of intentional discrimination on the basis of race or sex. No award of punitive damages is permissible against the County. Therefore, evidence as to the County's reasons for adopting the MFBE plan is irrelevant. The situation with regard to Defendant Cooper is complicated by his defense of qualified immunity. Based upon the conferences with counsel, the Court cannot determine at this point what Mr. Cooper intends to do with respect to his qualified immunity defense. The Court has already granted Mr. Cooper and the other individual defendants summary judgment with respect to their claims of legislative immunity. Therefore, his reasons, or the County's reasons, for adopting the MFBE plan are irrelevant. His personal belief as to the validity of the plan is another story if he claims that he acted as he did in order to achieve the goals set forth in the MFBE plan. Special interrogatories to the jury may be necessary

depending upon the evidence that is presented if Mr. Cooper maintains his qualified immunity defense. For these reasons, the Defendants' Motion in Limine [Doc. 187] is GRANTED IN PART AND DENIED IN PART.

The Defendants' Request for Stay or to Defer Ruling on Plaintiffs' Motion for Attorneys' Fees [Doc. 186] is GRANTED IN PART AND DENIED IN PART. After careful consideration of the arguments of counsel, the Court concludes that it would be unfair and prejudicial to Plaintiff and its counsel to defer the issue of attorneys's [sic] fees until after the appeal has been concluded. The Court will, however, defer ruling on the Motion for Attorney's Fees until after the damages trial.

SO ORDERED, this 19 day of November, 1999.

/s/ Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DANIEL WEBSTER, et al., Plaintiffs, v. FULTON COUNTY, GEORGIA, et al., Defendants.	CIVIL ACTION FILE NO. 1:96-CV-2399-TWT

AMENDED ORDER

(Filed Feb. 8, 2000)

This case is before the Court on the Defendants' Motion in Limine [Doc. 223-1] and Motion for Reconsideration [Doc. 223-2]. In the Motion for Reconsideration, the Defendants argue that the existence of the Fulton County MFBE program is irrelevant to the issue of whether the County and Mr. Cooper discriminated against the Plaintiff because of the race of its owner. The Defendants also argue that the County did not discriminate against anyone, but that the jury will be inflamed if allowed to hear about the County's MFBE program. The Court rejected these arguments in its Order of November 19, 1999, holding that evidence of the MFBE is relevant and admissible. With respect to the Plaintiff's damage claim, the Court does not accept either Plaintiff's or Defendants' version of the facts as being true and undisputed. Whether the Plaintiff was discriminated against because of race will be decided by a jury rather than by the Court in ruling on a motion in limine. The Motion for Reconsideration [Doc. 223-2] is DENIED. The Motion in Limine [Doc. 223-

1] is GRANTED IN PART AND DENIED IN PART. The Motion in Limine is denied to the extent that the Defendants once again argue that evidence of the existence of the MFBE program and the Court's ruling as to its illegality are irrelevant. The Motion in Limine is granted with respect to tree removal and landscaping bids after January 1, 1997. The Court is not persuaded based upon Plaintiff's response to the motion that the relevance of this evidence is not "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. For the same reason, the motion is granted with respect to other race discrimination claims against the County, including the Bowman and Alexander actions and the whole Big Creek affair that is the subject of another lawsuit pending in this Court. Counsel for the Plaintiff is directed not to refer to these matters in opening statement. The Court will give the Plaintiff an opportunity to make an offer of proof as to these matters, and the Court may reconsider this ruling after having heard the offer of proof.

SO ORDERED, this 8 day of February, 2000.

/s/ Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-11644-CC

DANIEL WEBSTER,
PEGGY WEBSTER, et al.,

Plaintiff-Appellants
Cross-Appellees,

versus

FULTON COUNTY, GEORGIA,

Defendant-Appellee
Cross-Appellant.

On Appeal from the United States District Court for the Northern District of Georgia

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(Filed Jun. 24, 2002)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: EDMONDSON, Chief Judge, WILSON, Circuit Judge and PAUL*, District Judge.

---

* Honorable Maurice M. Paul, U.S. District Judge for the Northern District of Florida, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DANIEL WEBSTER, et al., Plaintiffs, v. FULTON COUNTY, GEORGIA, et al., Defendants.	CIVIL ACTION FILE NO. 1:96-CV-2399-TWT

VERDICT

(Filed Feb. 24, 2000)

1.

Did the Defendant Fulton County intentionally discriminate against the Plaintiff on the grounds of race?

_X_ Yes

____ No

2.

Did the Defendant Michael Cooper Intentionally discriminate against the Plaintiff on the grounds of race?

_X_ Yes

____ No

If the answer to question 2 was "yes," answer questions 3 and 4. If the answer to question 2 was "no," skip questions 3 and 4.

3.

Did the Defendant Michael Cooper intentionally discriminate against the Plaintiff on the grounds of race in order to comply with the goals of the 1994 Fulton County MFBE Program?

_X_ Yes

____ No

4.

Did the Defendant Michael Cooper intentionally discriminate against the Plaintiff on the grounds of race in a good faith effort to respond to a non-frivolous complaint by another contractor of discriminatory treatment?

_X_ Yes

____ No

If you responded "yes" to question 1 or question 2 above, answer question 5. If the answers to both questions 1 and 2 were "no," skip the remaining questions. In question 5, if you find that only one Defendant is liable for a specific act of discrimination, so indicate in the space provided in parenthesis.

5.

We award the Plaintiff compensatory damages against the Defendants found liable in questions 1 and 2 in the following amounts:

$ 1,250 1995 Mt. Paran Job (Defendant Fulton Co. only)

$ 7,500 1996 Purchase Order Reduction or Re-Issuance (Defendant Fulton Co. only)

$ 1 Nominal Damages (Defendant Michael Cooper only)

If you awarded damages against Defendant Michael Cooper in paragraph 5 above, answer the following questions.

6.

Do you find that the Defendant Michael Cooper is liable to the Plaintiff for punitive damages

___Yes

X No

If you responded "yes" to question 6 above, answer the following question.

7.

We award the Plaintiff the sum of $_____ against Defendant Michael Cooper as punitive damages.

This 24th day of February, 2000.

/s/ Robert P. Hieronymus
FOREPERSON

(2)

Supreme Court U.S.
FILED
OCT 24 2002
OFFICE OF THE CLERK

No. 02-477

In The

Supreme Court of the United States

FULTON COUNTY, GEORGIA,

Petitioner,

v.

DANIEL WEBSTER, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

R. MASON BARGE
Counsel of Record
127 Peachtree St. NE
Suite 923
Atlanta, GA 30303
(404) 688-9780

PATRICK W. MCKEE
PATRICK W. MCKEE & ASSOCIATES
19 Spring St.
Newnan, GA 30263
(770) 683-8900

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, respondent Webster Greenthumb Co. shows that it is the only corporate respondent to the Petition, that it is a privately-held corporation, that it has no parent corporation, and that no publicly held corporation holds 10% or more of its stock.

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STATEMENT OF THE CASE

In 1995, Fulton County, Georgia, sought bids to have a tree removed from Mt. Paran Road. Webster Greenthumb, a small family-owned tree service, bid $2,500 to remove the tree. Ben's Landscaping bid $3,800 to cut down the same tree. Webster Greenthumb, which is owned and operated by a white couple (Daniel and Peggy Webster), had an excellent record of completing its jobs on time, in a safe manner, and cleaning up the job sites. Ben's Landscaping, which is owned and operated by an African-American man (Ben Edwards), had a poor performance history. The County awarded the contract to Ben's Landscaping, paying it $3,800 for a job that Greenthumb would have done for $2,500. (R1-1) The County offered no race-neutral explanation for its conduct.

Thereafter, in 1996, pursuant to its statutory bidding process, Fulton County awarded Webster Greenthumb a Purchase Order in the amount of $66,000 (the same amount as the previous year). Several weeks later, it summarily reduced the Purchase Order by $20,500 to $45,500. The sole reason for this reduction was to allow the County to increase the amount of work given to Ben's Landscaping, which received an increase in its annual Purchase Order in the precise amount of the reduction to Webster's Purchase Order – $20,500. (Plaintiffs' Trial Exhibits 203, 204, 380). Again, the reason for the award modification was undeniably race, whether in the form of meeting racial contracting goals or engaging in *ad hoc* remedial action in favor of Ben's Landscaping. (Pet. App. at 63-64.)

During this period, Fulton County[1] had in effect a published ordinance entitled "Minority and Female Business Enterprise Program" (hereinafter "MFBE Program") which gave preferences in contracting to businesses owned by women and members of certain minority ethnicities. The MFBE Program had "goals" of amounts to be awarded to minority businesses each year; by far the largest of these was a goal of awarding 26% of all county contracting to African-American businesses.[2] The MFBE Program was implemented and administered by Defendant Michael Cooper, the head of the County's Office of Contract Compliance. Cooper was responsible for ensuring that the percentages of the MFBE Program were met.

The Fulton County Department of Public Works wanted to award the Mt. Paran job to Webster Greenthumb, as the money came from its budget and Webster was not only less expensive, but also had a better track record for safe and efficient work. Michael Cooper essentially overruled them and required that the contract be awarded to Ben's Landscaping. (Similarly, it was Cooper who later intervened after the 1996 Purchase Orders were issued and required that the amounts be adjusted in favor of Ben's Landscaping.)

---

[1] The Fulton County Commission acts as both the legislative and executive body for the County and passed the MFBE Program into law. A majority of the County Commissioners are African-American.

[2] Plaintiffs' Trial Exh. 1. The other racial goals were 1% Hispanic, 1% Asian, and 1% Native American. The African-American "goal" was artificially inflated and did not represent the amount of work a racially-neutral system of contracting would be expected to produce. 51 F.Supp.2d at 1377-78.

During this time, Cooper had received complaints from Ben Edwards that his business, Ben's Landscaping, was suffering race discrimination. This – a desire to remedy discrimination against Ben's Landscaping – was one of Cooper's stated reasons at trial for intervening in the two contracts, the other reason being a desire to meet the 26% African-American contracting goal of the MFBE Program. Practically the entirety of Edwards' evidence of discrimination was that he was black and that non-minority companies were getting more work than his was. There was no specific instance of discrimination identified, no evidence that discrimination had occurred, no hearing to determine the validity of Edwards' complaint, and no opportunity for Webster Greenthumb (or companies which had gotten whatever bids Edwards was complaining about) to participate. Furthermore, there was no attempt to find a remedy other than taking work away from Webster Greenthumb to give to Ben's Landscaping.

In fact, Ben Edwards was later found to have insufficient basis for a complaint of race discrimination. His complaint was groundless. He had been given full opportunity to bid on County work in the past and had received all work that he was entitled to, where he was the low bidder.

Based on these facts, in 1996 Webster Greenthumb filed suit in the Northern District of Georgia, demanding injunctive relief and damages for violations of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1981. The district court bifurcated the trial process without objection. It determined that, first, it would hold a bench trial to decide the equitable issues, together with any facts necessary to its determination.

Afterwards, it would hold a jury trial to determine any damages to be awarded.

After the bench trial in 1999, the district court found that the Fulton County MFBE Program violated the Equal Protection Clause of the Fourteenth Amendment and entered a final judgment, enjoining Fulton County from considering race or gender in awarding County contracts. The district court decision was upheld in its entirety on appeal. *Webster v. Fulton County*, 51 F.Supp.2d 1354 (N.D.Ga. 1999), *aff'd*, 218 F.3d 1267 (11th Cir. 1999), *r'hrg and r'hrg en banc denied*, 235 F.3d 1347 (11th Cir. 2000), *cert. denied,* 532 U.S. 942 (2001).

In 2000, the district court held the jury trial on Webster's damages claim. At the beginning of the trial, the court read to the jury a statement of undisputed facts previously entered into evidence during the bench trial. The court further informed the jury that it had held the MFBE Program to be unlawful, that this holding was binding on the jury, and that the jury therefore must accept that the MFBE Program was not a valid defense to race discrimination.

The jury found that both Fulton County and Michael Cooper had intentionally discriminated against Webster Greenthumb on the basis of race. It awarded actual damages of $8,750 against Fulton County and nominal damages of $1 against Michael Cooper. (Pet. App. at 63-65.)

The verdict form also had two interrogatories (#3 and #4) relating solely[3] to Cooper's claim of qualified immunity. (Pet. App. at 64.) In #3, the jury found that Cooper discriminated in order to meet the goals of the MFBE Program, and in #4, it found that Cooper discriminated in a good faith effort to respond to a non-frivolous complaint by another contractor (Ben's Landscaping) of discriminatory treatment. Based on these two interrogatories, the district court granted Cooper qualified immunity and voided the award of nominal damages against him, pursuant to Fed. R. Civ. Proc. 50(b).

Webster's Retaliation Claim

In 1997 Fulton County solicited bids for tree removal services in the amount of $250,000. Webster Greenthumb and Ben's Landscaping (among others) bid on the proposal, and Webster was the low bidder. Evidence from the Purchasing Department establishes that Webster Greenthumb was actually awarded the bid in the amount of $250,000 on March 6, 1997. Though the bid package was forwarded through appropriate channels for finalization, it simply disappeared. Webster was never awarded a Purchase Order for its successful bid. Notwithstanding the fact that Webster was the low bidder and Ben's Landscaping was not, Fulton County thereafter awarded Ben's Landscaping – and not Webster – an "Interim Purchase

[3] One can see from the verdict form itself that interrogatories #3 and #4 related solely to Cooper's qualified immunity defense. The jury was instructed to skip these questions unless it had found that Cooper was individually liable for discrimination against Webster. (Pet. App. at 63, final paragraph.)

Order for Tree Removal" in 1997 (using an "informal" process[4]) and assigned the work to him. (Plaintiffs' Trial Exh's 518 & 531-549)

Based largely on these facts, Webster Greenthumb amended its Complaint to include a count of retaliation, which amendment was accepted by the district court. Plaintiff's claim was that Fulton County refused to award this Purchase Order to it in retaliation for Plaintiff's assertion of rights under the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1981, *to-wit*, filing the initial lawsuit. On Defendant's motion, the district court dismissed the retaliation claim prior to trial as a matter of pure law. (Pet. App. at 48-49).

The Eleventh Circuit Court of Appeals reversed the dismissal, holding that the County would be liable in damages for refusing to enter into a contract with Webster Greenthumb, if the refusal were based on retaliation against Webster Greenthumb for attempting to enforce rights guaranteed by the Equal Protection Clause and 42 U.S.C. § 1981. (Pet. App. at 2.)

---

[4] That is, a Purchase Order bypassing the formal bidding process and eliminating the opportunity for other persons (specifically Webster) to place a lower bid.

ARGUMENT

I. A. The Eleventh Circuit's Holding, That Webster Greenthumb Stated a Valid Claim for Retaliation under 42 U.S.C. § 1981, Does Not Conflict with *Board of Commr's v. Umbehr*.

The Petition articulates the first "question presented" as follows:

> I. Whether the Eleventh Circuit's holding, that respondent, as a "disappointed bidder," stated a claim for retaliation under 42 U.S.C. § 1981, is in conflict with the limited nature of this Court's decision in *Board of Comm'rs v. Umbehr*.

(Pet. at i.) The answer to this question is authoritatively provided in *Umbehr* itself, and the answer is "no":

> Because Umbehr's suit concerns the termination of a pre-existing commercial relationship with the government, **we need not address** the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship.

Board of Comm'rs v. Umbehr, 518 U.S. 668, 685 (1996) (emphasis added). The Eleventh Circuit's holding cannot possibly conflict with *Umbehr* on an issue that *Umbehr* did not address.

At one point, Fulton County actually torpedoes its own position, admitting that the current question "was therefore unresolved [by *Umbehr*]. WGT's retaliation claim now presents the issue that was previously left open." (Pet. at 12.)

The County then returns to a lengthy line of argument that it had just admitted was invalid:

> The Court of Appeals held that *Umbehr* was not applicable. . . . This is a distinction without a difference, however, because both situations involved a governmental entity allegedly punishing a bidder or applicant for engaging in some sort of protected activity. **There is simply no logic in denying disappointed bidders the opportunity to enforce a constitutional right under the First Amendment, while granting them the opportunity to enforce a** statutory right under § 1981, and the Eleventh Circuit should have applied *Umbehr*.
>
> Moreover, the Eleventh Circuit recently decided another case **in which it further eroded the limitation articulated in *Umbehr***.

(Pet. at 12-13, emphasis added.)

"Eroded the limitation"? This Court's announced refusal to decide an issue not before it hardly constitutes precedent which can be "eroded". This Court has never "den[ied] disappointed bidders the opportunity to enforce a constitutional right under the First Amendment" by filing a retaliation suit, and specifically did not do so in *Umbehr*. On the contrary, the *Umbehr* Court went out of its way to forestall the argument presented in Question I, and it is thus hard to find the least scrap of support for the Petitioner's argument.

B. *McClintock v. Eichelberger* Is Not Precedent for Any Issue in This Case.

Although the matter is not raised in the Questions Presented, Fulton County argues that the present case conflicts with *McClintock v. Eichelberger*, 169 F.3d 812 (3d Cir. 1999). No such conflict exists. The language in *McClintock* upon which the County relies comprises *dicta*. The dispositive (and therefore precedential) holding of the Third Circuit was that the plaintiff had failed to plead the matter in the district court and had thus failed to preserve the issue for appeal.

> In their brief in this court, appellants once again contend that '[e]ven assuming that this Court finds that [they] do not have the same status as the plaintiffs in *Umbehr* and *O'Hare*, [they] are nonetheless entitled to protection from government retaliation for exercise of their First Amendment rights.' We, however, **will not entertain this argument as appellants did not plead it** as the basis for relief in their complaint. Accordingly, we will affirm the order of the district court. . . .

169 F.3d at 817.

Having refused to entertain the argument and having affirmed the district court's decision, however, the Third Circuit proceeded to state that "even if [it] entertained" McClintock's substantive argument, it would hold that such a claim would fail.

The Respondent believes that statements following full disposition of the cause must be considered *dicta*. Having decided the case, an appellate court may not create precedent on an issue unnecessary to reach its decision, a

point of jurisprudence demonstrated by this Court's restraint in *Umbehr*.

C. The *McClintock Dicta* Do Not Conflict with the Holding of the Eleventh Circuit.[5]

Webster's retaliation claim seeks to protect his ability to seek redress for violations of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1981. *McClintock*, however, was a First Amendment case. It did not discuss "retaliation" under 42 U.S.C. § 1983 in a broad sense and did not base its reasoning on whether or not retaliation for the exercise of Constitutional rights should generally state a cause of action, or not. It was, rather, concerned with considerations peculiar to First Amendment litigation that would not control – or even be appropriate to the discussion of – a Fourteenth Amendment race discrimination case.

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[5] Because *Umbehr* explicitly did not address the issue of retaliation accomplished by refusal to "make" contracts, Respondent will not waste space arguing the differences between retaliation for free speech and retaliation for filing an equal protection lawsuit, in the context of this Court's previous decisions. The issue simply is not ripe. The purpose of this Section of the Argument is simply to demonstrate the fallacy of assuming that the Third Circuit would necessarily repeat the *McClintock dicta* as the controlling rationale in an equal protection case.

The Respondent, however, by reference to this section of the Response, reserves the argument that *Umbehr* (or any previous or subsequent First Amendment case) is not contrary precedent for cases seeking to protect a person, who has attempted to enforce rights guaranteed by the Equal Protection Clause, from governmental retaliation.

The very foundation of the *McClintock* holding is a concept largely foreign to equal protection:

> In *Horn v. Kean,* 796 F.2d 668, 678 (3d Cir. 1986) (in banc), we cautioned against extending First Amendment holdings if they would cause the judiciary to 'intrude itself into such traditional practices as contract awards by the government's executive. . . . '

169 F.3d at 817.

The Third Circuit's attitude toward governmental contracting decisions which are purposefully race-conscious – which on their face appear to violate the Equal Protection Clause – is entirely different. Once a court is convinced that a government is openly using race as a deciding factor in awarding contracts, it will have no hesitation to "intrude itself", unless the government's conduct can survive the court's strict scrutiny as to the evidentiary basis for believing relief is required, and the need to use a race-conscious remedy as a means of providing relief. *E.g. Contractors Ass'n of Eastern Pennsylvania v. Philadelphia*, 91 F.3d 586 (3d Cir. 1996). *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

A second distinction between the First Amendment and the Equal Protection Clause appears in the second stated basis for the Third Circuit's reasoning in *McClintock*. It considered that

> it is difficult for a court to predict what the consequences would be on political activity if the First Amendment protections are extended beyond the *Umbehr* and *O'Hare* boundaries. Perhaps the extension even would discourage political activity.

169 F.3d at 817. That is, elected officials have their own competing needs which must be weighed against an individual's First Amendment rights, such as the needs to exercise untrammeled free speech in the hurly-burly of the political arena, to avoid having a dissident employee's speech from being attributed to the official himself, and to accomplish the purposes of government in an efficient manner. *See, e.g., Pickering v. Bd. of Ed. of Township High School Dist. 205,* 391 U.S. 563, 568-69 (1968); *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion); *Branti v. Finkel*, 445 U.S. 507, 518 (1980). *See also United States v. Treasury Employees*, 513 U.S. 454, 475 (1995).

The rationale stated to support the *McClintock dicta* simply do not apply to a case pleading retaliation to chill the exercise of equal protection rights, and there is no reason to speculate that the Third Circuit would find them persuasive. It is hardly "difficult for a court to predict" the consequences of allowing governments to blacklist contractors challenging race-conscious affirmative action statutes – a baleful dampening of such lawsuits and a subsequent denial, in practice, of equal protection in governmental contracting. Unlike the tension between the First Amendment rights of an elected government official and a bidder for government contracts, there is neither a positive ideal to be pursued, nor a legitimate state interest to be protected, by governmental retaliation against a contractor who seeks equal treatment due to his race.

It is important to remember that this is a retaliation claim. Governments certainly have "competing rights" in the base litigation of the legality of an affirmative action program – most obviously, the right and duty to end their participation in race discrimination. In the context of **retaliation**, however, the only competing interest is one

the courts will hardly applaud: avoiding federal judicial scrutiny of governmental race preferences.

There is another, very different, reason to suspect that the Third Circuit would not differentiate cases involving the termination of existing contracts from cases involving the making of new contracts under 42 U.S.C. § 1981: The statute itself. In 1991, Congress amended § 1981 to include the following language:

> (b) "Make and enforce contracts" – defined.
>
> For purposes of this section, the term "make and enforce contracts" includes the making . . . of contracts. . . .

42 U.S.C. § 1981(b). By adding this provision to § 1981, Congress' very purpose was to forestall differentiation between "making" and "maintaining" contracts, for purposes of § 1981 enforcement. *See e.g. Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994).

The Third Circuit has not had an opportunity to discuss these powerful impediments to analogizing *McClintock* to an equal protection case and until it does, one must conclude that, given the chance, it would most likely agree with the Eleventh Circuit. At the very least, any deduction concerning the Third Circuit's attitude towards the issue presented in this case is speculative.

II. The District Court Correctly Instructed the Jury Regarding Intent.

III. "Good Faith" Is Not a Defense to Intentional Governmental Race Discrimination.

A. Introduction.

Respondent has consolidated its Response to Questions II and III in the Petition, as well as the County's argument made in pages 3-6 of the Petition's "Statement of the Case", because these arguments represent variations on a single theme.

The very first paragraph of Fulton County's Statement of the Case (Pet. at 3) shows the fatal flaw that runs throughout the Petition. The "serious dilemma" Fulton County claims to suffer is that it was not allowed to award two county contracts on the basis of race, even if the awards were a "good faith" response to a "credible[6] complaint of race discrimination". (*Id.*) This Court, however, has repeatedly and clearly held that such nebulous and permissive standards will not support governmental race preferences. Strict scrutiny is required. If a county seeks to defend a race-based preference on the ground that the preference is remedial, it must meet two stringent standards.

First, it must provide the court with a "strong basis in evidence" that the favored race is suffering discrimination tied to the county's actions. *E.g. Wygant v. Jackson Bd. of*

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[6] The county's use of the term "credible" is its own invention. The term in the record is "non-frivolous", a much lower standard. See Pet. App. at 64.

Educ., 476 U.S. 267, 277 (1986). Fulton County's plea that it should be allowed a defense based on a "non-frivolous complaint of discrimination" is the polar opposite of the "strong basis in evidence" of discrimination against the favored race, which strict scrutiny requires.

Second, it must demonstrate that the remedy is "narrowly tailored"[7] to achieve a specific remedial goal, which involves a number of factors, such as "the necessity for the relief", "the efficacy of alternative remedies", "the flexibility and duration of the relief", and "the impact of the relief on the rights of innocent third parties." *Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 927 (11th Cir. 1997). It must, most importantly, demonstrate full "consideration" of remedies other than racial preferences and give reasons why they have not been effective. *Id.* Fulton County proffered no evidence whatsoever that discrimination against Webster was "narrowly tailored", nor did it argue such. Racial discrimination in favor of the minority contractor was the first and only relief considered.

Fulton County's "good faith" standard, which it asserts should obviate the narrow tailoring requirement, is even more lenient that the "reasonableness standard" rejected in *Wygant:*

> The Court of Appeals examined the means chosen to accomplish the Board's race-conscious purpose under a test of "reasonableness". That standard has no support in the decisions of this

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[7] *E.g. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-95 (1989).

> Court. As demonstrated in Part II above, our decisions always have employed a more stringent standard. . . .

476 U.S. at 278-79.

The only dilemma faced by Fulton County is that it does not want to obey the law expounded by this Court.

B. The District Court Correctly Instructed the Jury Regarding Intent.

After the jury was sent out for deliberations, it sent a note to the district court requesting clarification of the legal meaning of "intent". The context of the request made it apparent that the jury was primarily confused as to whether animus was a required element of intent.[8] Fulton County, misappropriating language from disparate impact cases, asked the district court to instruct the jury that discriminatory "intent" could be proven only by showing the County intended to have "an adverse effect" on white people. In context, the jury would have undoubtedly construed this language as a requirement of ill-will or hostile animus. In effect, the County tried to introduce a "good faith" defense through the back door.

Webster thus asked the district court to instruct the jury that discriminatory "intent" could be proven by

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[8] Most likely, the jury's confusion stemmed from the language of Interrogatory #4 (Pet. App. at 63) – a question intended to be answered after, and only if, the jury had found that Cooper individually intentionally discriminated against Webster due to his race. Interrogatory #4 related only to Cooper's defense of qualified immunity. See Section C, directly below.

showing that the defendant intended to prefer one person over another, because of their respective races, whether or not the defendant showed overt *hostility* to one race. The district court fashioned a response which clearly defined the meaning of "intent" in a case of disparate treatment due to race, with an explanatory sentence confirming that hostile animus is not an element of "intent" in such a case.

The district court and court of appeals were entirely correct. "Hostile animus" has never been required by this Court as an element of proof in opposing openly race-conscious governmental contracting. In *Goodman v. Lukes Steel Co.*, 482 U.S. 656 (1987), this Court found that a union had intentionally discriminated against black employees in violation of 42 U.S.C. § 1981, because it had premised its decisionmaking on race, even though "there was no suggestion that the [defendant] held any racial animus against or denigrated blacks generally." 482 U.S. at 668.

The Eleventh Circuit has summed up the rule succinctly: "[R]acial animus and intent to discriminate are not synonymous. [fn. 7] In other words, ill will, enmity, or hostility are not prerequisites of intentional discrimination [under § 1981]." *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 472-73, 473 n. 7 (11th Cir. 1999).

The County cites *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979) – an adverse impact case – not for any actual holding considered and then stated by the Court, but because the language used in *Feeney*, when transplanted to a disparate treatment case without modification, gives

the mistaken impression that a decision **openly based on race** is legal, as long as the defendant's motive was "benign"[9] – that is, as long as the defendant's purpose was to have a beneficial effect on the favored race, rather than to have an adverse effect on non-favored races.

The issue actually addressed by the *Feeney* Court was whether a non-discriminatory law with a predictable discriminatory effect against women would be unlawful *per se*, on the one hand, or whether it would be held unlawful only if the legislative purpose was gender discrimination, on the other. That is, whether the legislature intended to pass the law granting legitimate preferences to veterans *in spite of* a discriminatory effect, or *because of* its discriminatory effect. The decision has no relevance to a case like the present one, where "because of race" is the very standard announced by the court.

The Court neither considered nor answered the issue raised by Petitioner Fulton County; nor could it. The language that *Feeney* was concerned with – and the authority of its holding – was the difference between "because of" and "in spite of". *Feeney* did **not** intend to

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[9] In effect, the County wants to reopen a hidden defense of benign discrimination, long discredited in this Court: "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight. See *Weinberger v. Wiesenfeld*, 420 U.S. at 648, n. 16. . . ." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). The weakness of the defense is compounded by the racial composition of the Fulton County Commission. *Cf. Croson*, 420 U.S. at 495-96 ("The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.")

differentiate between the concept of "adverse effect" on one gender as opposed to the concept of "preferential beneficial effect" on the other gender, nor is it instructive whatsoever where the **stated purpose** of the government's action is the favoritism of one person over another "because of" their races.

C. The Issue of a "Good Faith Defense" Is Not Properly Presented by the Petition.

Fulton County claims that it should be excused from intentional race discrimination because the jury found that a co-defendant, Michael Cooper, did "intentionally discriminate against the Plaintiff on grounds of race in a good faith effort to respond to a non-frivolous complaint by another contractor of discriminatory treatment." The Petition, however, fails to recite facts that would be required as a foundation to support review of the third Question Presented – specifically, facts demonstrating that the County advanced "good faith" as a substantive defense to County liability, that it asked the district court to charge the jury concerning the substantive defense of "good faith", that the district court refused to give the instruction, or even (since the jury found that Cooper's immediate purpose was, at least in part, to implement the unlawful racial goals of the MFBE Program) that the alleged error was harmful.

Interrogatory #3 applied solely to co-defendant Cooper and applied solely to the issue of qualified immunity.[10] Fulton County cannot enjoy qualified immunity, a defense applicable only to individual defendants. *E.g. Doe v. Sullivan County*, 956 F.2d 545, 554 (6th Cir. 1992). The interrogatory, and its answer, have nothing to do with the substantive issue of whether Cooper (much less the County) intentionally discriminated against Webster Greenthumb on account of Daniel Webster's race.[11] That

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[10] The jury awarded nominal damages of $1 against Cooper. The trial court later entered a defense verdict in Cooper's favor pursuant to Fed. R. Civ. Proc. 50(b).

Respondent Webster Greenthumb objected to the inclusion of the "good faith" interrogatory on the jury form even concerning Cooper's immunity claim, as it does not believe Cooper would be entitled to immunity from a conscious act of race discrimination against Webster, simply because he thought in "good faith" that someone had previously discriminated against Ben's Landscaping. Proof of qualified immunity has no such subjective component (*see Harlow v. Fitzgerald*, 457 U.S. 800 (1982)), unless subjective motive is a substantive defense. *Crawford-El v. Britton*, 523 U.S. 574 (1998). But, as shown below, "good faith" is not a defense to *per se* race discrimination by a state actor. At no point did Cooper claim that he would have made the same decision absent the component of race. There was simply **no** "motivating factor other than race" claimed or proved.

Respondent did not appeal Cooper's dismissal or the court's inclusion of Interrogatory #4 on the verdict form, however, for three primary reasons: 1) it believed Cooper had other, more colorably valid grounds to support a finding of qualified immunity, 2) Webster's chances of obtaining punitive damages against Cooper were not great enough to justify the cost of the appeal, and 3) Other than punitive damages, Webster obtained full relief from the County. Nevertheless, Webster contends that the jury's response to this interrogatory was entirely irrelevant to any issue in the case.

[11] In this regard, it is critical to note the exact language of the interrogatory: "Did the Defendant Michael Cooper **intentionally discriminate against the Plaintiff on the grounds of race** in order

(Continued on following page)

jury answered that question in Interrogatory #2. (Pet. App. at 63.)

Whether or not a government might enjoy a defense of "good faith", where it has committed an act of racial discrimination to remedy what it considers in good faith to be discrimination in favor of another race, is thus irrelevant to the outcome of this case. The district court properly instructed the jury:

> If you find that the Defendant Fulton County would have, more likely than not, made the same contracting decisions concerning the plaintiff even if the unlawful motive was not present, the plaintiff is not entitled to damages with respect to such an action where there were motivating factors other than race.

(Doc. 294-Pg. 19). The jury found, thus, that neither Cooper nor the County would have made the same contracting decisions except for the race of the two contractors and its verdict was both correct and consistent.

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to. . . ." (Pet. App. at 64, emphasis added.) What it does **not** say is that "Defendant Cooper acted not on the basis of race, but instead . . . ," or, as misstated in the Petition, "Faced with Edwards' complaint, the jury found that Cooper acted in good faith to remedy it." (Pet. at 23.) The verdict will not support any inference that Cooper took his "remedial" action with a non-discriminatory motive, such as doing so as part of a racially-neutral program of remedying discrimination. Yes, Cooper was concerned "in good faith" with remedying discrimination, **but only discrimination against African-Americans**. One must note, in this regard, the difference between the County's eagerness to remedy an unsupported complaint of race discrimination made by Ben Edwards, compared to its utter intransigence in response to a valid complaint of discrimination from Daniel Webster. *Res ipsa loquitur.*

D. "A Good Faith Effort to Respond to a Non-Frivolous Complaint of Discrimination" Does Not Constitute a Defense to Intentional Race Discrimination.

The County asks this Court to ignore hundreds of previous cases requiring courts to engage in strict scrutiny of affirmative action, and hold that a governmental actor can choose its contractors by race – on an *ad hoc* basis! – as long as it is "responding in good faith" to a "non-frivolous" complaint of race discrimination, without offering any evidence that the discrimination occurred or that another remedy was inadequate to resolve it. In an individual case, it would replace the "strong basis in evidence" required by this Court with almost the weakest level of evidentiary burden possible: "non-frivolous". It would entirely eliminate the requirement of "narrow tailoring". And to top off the cake, it would promote such a defense in the face of an established motive of furthering an illegal racial goal.

The Petitioner even has the temerity to cite *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), as **supporting** the proposition that a government has a "good faith" defense to intentional race discrimination! The central holding of *Wygant* is the very opposite. *Wygant*'s primary holding was to establish a much higher standard of proof to be met by a governmental actor prior to engaging in "remedial" race discrimination.

Wygant considered the possibility that a public school board could show preference to minority employees during layoffs, if it "reasonably" believed that the minority was under-represented in the workforce due to previous discrimination in hiring. The Court concluded that the school board could not, and announced that such "remedial

discrimination" would be subject to strict scrutiny. The discriminating actor's "good faith" belief that it had previously discriminated against the race now favored simply does not present a sufficient defense to a suit under the Equal Protection Act. Rather, the state actor committing discrimination is required to show "convincing evidence that remedial action is warranted" (476 U.S. at 277) and, **in addition**, show that the remedy for such prior discrimination is "narrowly tailored", with full consideration of the possibility that a non-race-conscious remedy might have remedied the situation. *E.g.* 476 U.S. 279-280 and n. 6.

The bottom line is that the *Wygant* Court rejected, as insufficiently strict, a stronger defense than the "good faith" defense espoused by Fulton County:

> The Court of Appeals examined the means chosen to accomplish the Board's race-conscious program under a test of 'reasonableness.' That standard has no support in the decisions of this court.

476 U.S. at 275. Fulton County seeks to find support in *Wygant* for a "good faith" and "non-frivolous" defense which must be considered even more lenient than a "reasonableness" test. Its Petition on this issue falls far short of showing grounds for a writ of certiorari.

E. The County's "Dilemma" Is Self-Imposed.

Fulton County laments that it had one complaint of race discrimination from a black vendor (Ben's Landscaping) and another complaint of discrimination from a white vendor (Webster Greenthumb), in the same category of contracting, tree removal services. Therefore, the County

argues, "The only way for the County to have avoided liability in both cases was for Cooper to guess[12] correctly in advance of litigation which contractor would ultimately be held to have a valid complaint and to remedy only that contractor's claim." (Pet. at 23.)

Only willful blindness could account for such a string of absurd propositions. The County could easily have handled the complaint from Ben's Landscaping without committing a second, clearly discriminatory, act.

In the first place, it could pass a statute prohibiting race discrimination![13] When Mr. Edwards complained, the County could have gathered evidence. It could have held hearings. It could have made formal or at least informal findings of fact. It could simply have paid Ben's Landscaping $1,300 while giving Webster Greenthumb the Mt. Paran contract, spending the exact same amount of money without committing discrimination against Webster. It could simply adopt and follow a policy of giving bids to the lowest qualified bidder regardless of race. It could appreciate the simple distinction between Edwards' vague and unsupported complaint, and its own intentional award of work based on the bidders' races. If the County itself **really** thought it had discriminated against Ben's Landscaping, it could pay damages in settlement of the case

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[12] The fact that Cooper apparently "guessed" that the minority company had suffered discrimination and the non-minority company had not, despite strong contrary evidence, speaks for itself.

[13] Remarkably, Fulton County had not even passed an ordinance prohibiting race discrimination in contracting or subcontracting, much less a procedure for determining the validity of such complaints.

and insure that no race discrimination occurred in the future. And so on.

One must suspect the County's very credibility in its complaint of a dilemma. It has engaged in extensive and protracted litigation against Webster over a claim for roughly $10,000, while its response to Ben Edwards was an immediate attempt to find a monetary remedy, prior to any sort of adequate investigation.

One thing is certain. If the County thought there was valid reason to believe it had discriminated against Ben's Landscaping – which, as it turned out, it did not – the solution is not to turn around and "remedy" the unproven allegation by openly discriminating against an innocent white bidder in a later contract. Affirmative action must be the last line of defense to proven discrimination, not the first reaction to an unproven allegation. *E.g. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

The County has nobody to blame but itself. Its "dilemma" is entirely a self-inflicted injury.

IV. The District Court Was Required to Instruct the Jury that the MFBE Program Was Unlawful, to Prevent Inconsistent Verdicts.

The last of the County's "Questions Presented" hardly even pretends to state grounds for certiorari. It seeks nothing more than another appeal of the application of well-established law to the facts of the case.

The County's MFBE Program was unlawful. The matter was decided in a prior trial, the verdict was affirmed by the proper court of appeals, and this Court denied a petition for certiorari.[14] The parties at the jury trial were the same as the parties at the bench trial; the case was the same case; the MFBE Program was the same program. The precise issue – the legality of the Fulton County MFBE Program – had been subject to a final verdict.

Under the law of the case doctrine, "findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial or on a later appeal." *Burger King Corp. v. Pilgrim's Pride Corp.*, 15 F.3d 166, 169 (11th Cir. 1994) (citations omitted). *See Epic Metals Corp. v. Souliere*, 181 F.3d 1280 (11th Cir. 1999).

The district court's instructions concerning the MFBE Program were not only *correct* under the law of the case doctrine, but were also *required* to prevent an inconsistent verdict. The jury was legally bound to follow the prior decision. It thus had to be informed of both the decision and the legal implications stemming from it. To leave the jury in the dark would have served no purpose except to spawn a mistrial.

Apparently, the County would have had the jury return a verdict in its favor on grounds that the MFBE Program was legal; but the law of the case doctrine (not to

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[14] *Webster v. Fulton County*, 51 F.Supp.2d 1354 (N.D.Ga. 1999), *aff'd*, 218 F.3d 1267 (11th Cir. 1999), *r'hrg and r'hrg en banc denied*, 235 F.3d 1347 (11th Cir. 2000), *cert. denied*, 532 U.S. 942 (2001).

mention the doctrine of issue preclusion) forbids this. One might find grounds supporting a petition for certiorari if the circuits were in conflict about the application of the law of the case doctrine or this Court had previously held that the law of the case doctrine is flawed. Fulton County, however, makes no such argument.

The argument in Section IV of its Petition, instead, argues that the courts below somehow contravened *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). It is hard to glean exactly what the County is talking about. The County's cries of a "presumption" in Plaintiff's favor is not supported by any record citation. The district court placed the burden of proof entirely on the Plaintiff for all issues the jury was authorized to decide.

Concerning the evidentiary issues, an individual may often, within the primary discretion of the district court, introduce evidence of other incidents of discriminatory conduct to prove pretext. "Other evidence that may be relevant to any showing of pretext includes facts as to . . . [the defendant's] general policies and practices with respect to minorities." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824 (1973). In the present case, the district court admitted some such evidence and disallowed other such evidence, depending on how relevant to issues in Webster's case it considered the specific evidence to be. (*E.g.* Pet. App. at 60.) Concerning the evidence that was admitted, the County has had its argument heard by the district court (which also upheld many of the County's evidentiary objections), and has had its appeal on the admission of evidence heard by the Eleventh Circuit. Its inclusion here is, purely and simply,

an attempt to appeal, again, the application of established law to the facts of the case.

CONCLUSION

In the quagmire of issues raised in the Petition, only one – the first – suggests a question potentially appropriate for this Court's review at some time in the future. The written portion of the Eleventh Circuit's decision is a case of first impression in the appellate courts: whether 42 U.S.C. § 1981 will support a cause of action for governmental retaliation against a citizen's efforts to protect his rights under the Equal Protection Clause, where the retaliatory act is the government's refusal to enter into a contract with such person. The Petition's first "Question Presented" does not show any disagreement with this Court's prior decisions, or conflict among the circuits, or major issue of national significance, or any other reason why it is appropriate for review by the Supreme Court of the United States.

This Court may be called upon to resolve this issue at some point. Equally possible, it may never need address the issue. At this time, with only one circuit having decided the issue, it would certainly be premature.

The other three Questions ask for nothing more than another appeal claiming "the misapplication of a properly stated rule of law." The court of appeals did not even see a need to issue a written decision on these issues, and it therefore summarily affirmed the district court's careful

and well-reasoned holdings. Respondent Webster Greenthumb therefore asks that the Petition be denied.

Respectfully submitted,

R. MASON BARGE
Counsel of Record
127 Peachtree St. NE
Suite 923
Atlanta, GA 30303
(404) 688-9780

PATRICK W. MCKEE
PATRICK W. MCKEE & ASSOCIATES
19 Spring St.
Newnan, GA 30263
(770) 683-8900